IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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No. 82-5348

WARDELL RILEY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

WHETHER A STATE APPELLATE COURT, IN UPHOLDING DEATH SENTENCING FINDINGS OF A TRIAL COURT DESPITE EVIDENCE THAT THE TRIAL COURT FAILED TO CONSIDER AS A MATTER OF LAW EVIDENCE OF NON-STATUTORY MITIGATING FACTORS, VIOLATES THE RELIABILITY AND INDIVIDUALIZATION REQUISITES OF THE EIGHTH AMENDMENT.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

WARDELL RILEY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Wardell Riley, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Florida in this cause, rendered on June 7, 1982.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 413 So.2d 1173. The full opinion is included in the appendix to this petition at pages 1-3.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), to review the judgment and opinion of the Supreme Court of Florida, issued on April 1, 1982 and rendered upon the denial of a timely motion for rehearing on June 7, 1982. On July 26, 1982, Mr. Justice Powell issued an order extending the time for filing this petition to September 5, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMEND. VIII, U.S. CONST.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMEND. XIV. §1, U.S. CONST.

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§921.141, Fla. Stat (1975)

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection [5], and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection [6], to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections [5] and [6] and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

* * *

(6) MITIGATING CIRCUMSTANCES. - Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE

For his participation in two felony-murders occurring during a robbery, petitioner's trial jury recommended a sentence of life for one homicide offense and a sentence of death for the other offense. (A. 2). The trial judge adhered to the jury recommendation and imposed one death sentence, finding six factors in aggravation and one factor in mitigation. (A. 2, 16-18).

On direct appeal in the Supreme Court of Florida, that court vacated the death sentence and remanded the cause for resentencing by the trial judge, with one justice dissenting on the basis that the evidence was insufficient as a matter of law to sustain the convictions. Riley v. State, 366 So.2d 19 (Fla. 1978); (A. 2). The majority concluded that four of the six findings in aggravation which had been relied upon by the trial judge in imposing the death sentence had been improper; since there was at least one mitigating circumstance present, reconsideration of the sentence by the trial judge was deemed required. (A. 2).

At the resentencing proceeding held on April 19, 1979, six witnesses testified in mitigation of sentence and one witness testified in aggravation of sentence. (A. 25-53). With regard to mitigation, an anthropologist who had established a relationship with petitioner during a two year study of the state prison system testified as to petitioner's contribution to prison society and certain educational, religious, and family factors which established a likelihood that petitioner would be a constructive member of society if released, and five members of petitioner's family testified regarding petitioner's family, religious and employment background. (A. 25-51). At the conclusion of the testimony, the prosecutor and defense attorney presented argument. (A. 53-61). The prosecutor argued, inter alia, "We have two aggravating circumstances. One mitigating factor that the Supreme Court told the Court it could consider." (A. 55).

Thereafter, the trial judge imposed a sentence of death, finding the two statutory aggravating factors previously approved by the Supreme Court of Florida, and the one statutory mitigating factor previously approved by the appellate court. (A. 12-14, 64). The sentencing order of the trial court provides in pertinent part:

> After having considered all the testimony, evidence and arguments which have been presented, and having considered the provisions of Section 921.141, Florida Statutes, and having considered the opinion of the Supreme Court, the court, independent of, but in agreement with the advisory sentence of the jury does hereby impose the death penalty upon the defendant, Wardell Riley.

(A. 12). With regard to mitigation, the trial court found as follows:

> As to the mitigating circumstances:
>
> 1. The defendant has no significant history of prior criminal activity. (Section 921.141(6)(a) Florida Statutes).
>
> There are no other mitigating circumstances.

(A. 13).

On direct appeal from the death resentencing, petitioner contended, in pertinent part, that the trial court had erroneously failed to consider evidence in mitigation where it was outside the confines of the statutory mitigating factors prescribed in Section 921.141(6), Florida Statutes (1975), thereby violating the Eighth and Fourteenth Amendments to the Constitution of the United States. (A.93-100). In briefing this claim, petitioner explicated:

> It must be emphasized that the defendant is not claiming that, as a matter of law, the trial court was obliged to give overriding weight to the non-statutory mitigating evidence . . . . Rather, it is the failure to weigh at all this mitigating evidence which forms the gravamen of the defendant's claim. For ultimately, the unduly restrictive view of the evidence which could be considered ensured that an individualized and reliable sentencing resolution would not be achieved.

(A.100).

The Supreme Court of Florida, in rejecting petitioner's claim, with one justice dissenting, held as follows:

> We reject Riley's contention that the trial judge failed to consider certain evidence introduced by Riley during the resentencing proceeding to demonstrate nonstatutory mitigating factors. The trial judge expressly stated that he considered all the testimony and evidence presented. Furthermore, there is no indication from the record that he limited his consideration of mitigating factors to only those which are statutorily enumerated. Because he failed to find the mitigating factors which Riley urged does not mean that he did not consider the evidence. It lies within his province to decide whether a particular mitigating circumstance in sentencing is proven and the weight to be given it. Smith v. State, 407 So.2d 894 (Fla. 1981). Lucas v. State, 376 So.2d 1149 (Fla. 1979). Here, we find no error in his decision.

(A. 3).

On motion for rehearing, petitioner pointed out that Florida law requires a trial court, in imposing a sentence of death, to specify in writing the factors weighed in aggravation and mitigation, and that the sentencing findings of the trial court in this case reflect that only the evidence of a statutory mitigating factor was considered; as a result, petitioner contended his sentence was in contravention of the mandate of Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982). (A. 6-7). This motion was denied on June 7, 1982. (A. 11).

REASONS FOR GRANTING THE WRIT

THE SPECULATION IN WHICH THE SUPREME COURT OF FLORIDA ENGAGED IN HOLDING THAT THE TRIAL COURT HAD CONSIDERED NON-STATUTORY MITIGATING EVIDENCE PRESENTED AT THE SENTENCING PROCEEDING BUT OMITTED FROM THE SENTENCING FINDINGS OF THE LOWER COURT VIOLATES THE MANDATE OF EDDINGS V. OKLAHOMA, U.S. , 102 S.Ct. 869 (1982), AND RAISES SERIOUS AND CONTINUING CONSTITUTIONAL QUESTIONS REGARDING THE PROPER SCOPE OF STATE APPELLATE REVIEW IN CAPITAL CASES.

This Court has made clear that meaningful appellate review of the decision to impose the sentence of death is a vital component of a constitutional state capital punishment system.

Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 1765 (1980); Gardner v. Florida, 430 U.S. 349, 361 (1977); Proffitt v. Florida, 428 U.S. 242, 258-60 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Consistent with this basic precept, Florida law imposes an obligation upon the sentencing judge to articulate with specific findings of fact the evidence in aggravation and in mitigation considered or rejected in reaching the weighing judgment that death is the appropriate sentence. Proffitt v. Florida, supra at 251; Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980); State v. Dixon, 283 So.2d 1, 8 (Fla. 1973); Section 921.141(3), Florida Statutes (1975). These sentencing findings, required by Florida law to be reduced to writing, can then be meaningfully examined by the state supreme court to ensure that sentencing evidence is properly considered in accordance with the appropriate standards of state and federal law. Ibid.

In the case at bar, it is undeniable that the sentencing findings of the trial court regarding the mitigating factors considered in the weighing process were identical in the original sentencing and the resentencing proceedings; one statutory mitigating factor was considered, petitioner's lack of a prior criminal history. (A. 12-14, 16-18).[1] Yet, it is equally undeniable that petitioner presented extensive evidence of non-statutory mitigating factors at the resentencing hearing which

---

1 In the original sentencing findings, the trial court explained:

> I have searched in vain for sufficient mitigating circumstances under the law which would justify a sentence other than the death penalty in this case.
>
> * * *
>
> The only mitigating circumstances under Florida Statute is the fact that the Defendant had no prior criminal conviction.

(A. 16).

In the resentencing findings, the trial court again found:

> As to mitigating circumstances:
>
> 1. The Defendant has no significant history of prior criminal activity. (Section 921.141(6)(a) Florida Statutes).
>
> There are no other mitigating circumstances.

(A.13).

was in no way mentioned in the final sentencing order of the trial court.[2] Given the state requirement of detailed sentencing findings, the possibility that the trial court deemed itself constrained by Florida law to consider only mitigating evidence which fell within the parameters of the statutorily-enumerated factors is accordingly strongly supported by this record.[3]

---

2 This case is distinguishable from the situation where a defendant merely disagrees with the weight to be accorded specific sentencing findings. Admittedly, disagreement with the force to be given evidence is not a basis under current Florida law for challenging a death sentence.

Thus, by way of contrast, in the decision of Quince v. State, 414 So.2d 185 (Fla. 1982), the Supreme Court of Florida appropriately rejected the defendant's contention that the trial judge had given insufficient weight to the mitigating circumstance of mental impairment, emphasizing:

> The trial judge demonstrated in his sentencing order his close consideration of this very factor. Nor is this a case in which the trial judge considered matters he should not have.
>
> Rather, this is a case in which the appellant disagrees with the weight that the trial judge accorded the mitigating factor. But mere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence.

Id. at 187. (original emphasis and citation omitted); see also Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980).

3 In the original sentencing findings, the trial judge stated, "I have searched in vain for sufficient mitigating circumstances under the law which would justify a sentence other than the death penalty in this case." (A. 16). In finding one statutory mitigating circumstance apposite to petitioner, the trial judge explained, "The only mitigating circumstance under Florida Statute is the fact that the Defendant had no prior criminal conviction." (A. 16).

In the decision on direct appeal, the Supreme Court of Florida noted:

> Appellant's principal argument to us is that a death sentence is not warranted for his crime, . . . and second because the statutory mitigating circumstances outweigh in significance the statutory aggravating factors.
>
> * * *
>
> The one mitigating factor found to exist in this case was appellant's lack of any significant history of prior criminal activity. All other mitigating factors in Section 921.141(6) were properly found to be absent.

Riley v. State, 366 So.2d 19, 21 (Fla. 1978).

At the resentencing proceeding, the prosecutor contended that the opinion of the Supreme Court of Florida set forth the one

Nevertheless, the state supreme court, without foundation, rejected petitioner's claim in this regard, holding:

> [T]here is no indication from the record that he limited his consideration of mitigating factors to only those which are statutorily enumerated. Because he failed to find the mitigating factors which Riley urged does not mean that he did not consider the evidence.

(A. (3).[4]

---

3 (continued)
mitigating factor which the trial court could consider:

> We have two aggravating circumstances. One mitigating factor that the Supreme Court told the Court it could consider.

(A. 55)

And in the final order in support of petitioner's death sentence, the trial judge made the following findings in mitigation:

> As to the mitigating circumstances:
> 1. The Defendant has no significant history of prior criminal activity. (Section 921.141 (6)(a) Florida Statutes).
> There are no other mitigating circumstances.

(A. 13).

4
This conclusion of the appellate court is particularly surprising in light of the court's recognition, subsequent to petitioner's sentencing and resentencing proceedings, of a prior misconstruction of Florida law as delimiting the factors in mitigation to those delineated in the statute:

> The trial judge followed the law as he believed it was being interpreted at the time of trial. The United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), subsequently held that a defendant may not be precluded from offering as a mitigating factor any aspect of his character and record or any evidence concerning the circumstances of the offense which might justify a reduction of a death sentence to life imprisonment. In Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), we clarified the apparent misconstruction of Cooper v. State, expressing the view that our statute allowed any relevant mitigating evidence, and we explained that our decision in Cooper was never intended to limit consideration of mitigating circumstances to the named statutory factors.

Perry v. State, 395 So.2d 170, 174 (Fla. 1980).

Indeed, Justice Rehnquist, in his dissenting opinion in Lockett v. Ohio, pointed out that the plurality of this Court, in upholding the Florida capital sentencing scheme, had originally deemed the Florida statute to be similarly circumscribed:

> "The sentencing authority in Florida, the trial judge is directed to weigh eight aggravating factors against seven

It is this speculation by the state appellate court, and its refusal to seek clarification from the trial judge of his sentencing findings, which call into question the reliability of the state capital sentencing review system in this case. Indeed, it is this deviation from the clear dictates of Florida law, this review on the basis of conjecture outside the record, that posits the critical question of not merely the proper, but the constitutionally required, scope of appellate review in the capital case.

It is no longer open to question but that the sentencing arbiter must be free to give independent mitigating weight to all aspects of the defendant's character, record, and offense proffered in support of a sentence of life. Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 874 (1982); Lockett v. Ohio, 438 U.S. 586, 604-5 (1978). Yet, it is certainly an open question whether the trial judge in this case was aware that relevant mitigation is no longer confined to the statutory delineations. The ambiguity in the death sentencing findings of the trial judge is such as to command a remand of the cause for clarification by the lower court.

> Because sentences of death are "qualitatively different" from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.
>
> * * *
>
> Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 878 (1982).

---

4 (continued)

> mitigating factors to determine whether the death penalty shall be imposed."

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2974 (1978), quoting Proffitt v. Florida, 428 U.S. 242, 251 (1976)

(O'Connor, J., concurring) (citations omitted).

In the final analysis, the ambiguity in this record must be resolved not by speculation by the appellate court, but by explanation by the sentencing court. The practice by which an appellate court concludes no error without substantiation in the record is onerous in any case; but it is intolerable in the capital case where a reliable determination that an individualized sentencing judgment of death has been reached is a constitutional imperative.

As this Court admonished in assessing the propriety of another aspect of the Florida capital appeal structure:

> Since the State must administer its capital sentencing procedure with an even hand, see Proffitt v. Florida, 428 U.S., at 250-253, 96 S.Ct., at 2966-2967, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia.

Gardner v. Florida, 430 U.S. 349, 361 (1977) (footnote omitted).

CONCLUSION

Based upon the foregoing, petitioner respectfully requests this Court to issue its Writ of Certiorari to review the decision of the Supreme Court of Florida in this cause.

Respectfully submitted,

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That's just one incident, but I have come across other instances where I am absolutely convinced beyond any doubt that Mr. Riley has a very strong inner sense of social obligation and is able to relate in a social way to people with whom he disagrees.

He knows inmates there that he disagrees with, a rather violent group of inmates, and we have had discussions about this, and I see that ability to order that disagreement. I would see him as I say being a potential constructive member of society.

MR. MORRIS: Thank you very much, Mr. Turnbull for your testimony.

I extended a general invitation, Your Honor, to the members of Mr. Riley's family, and I stated at that time that we would have the hearing this afternoon at 1:00 o'clock if any of them wished to testify regarding Mr. Riley's character that they could come forward and do so. May I extend that invitation at this time?

THE COURT: Yes.

Will the members of the family who would like to say something on behalf of Mr. Riley step forward and we will take your testimony one at a time.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Would you please state your name?

IN THE SUPREME COURT OF THE UNITED STATES

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WARDELL RILEY,

Petitioner,

vs.

THE STATE OF FLORIDA,

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APPENDIX

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Warhell RILEY, Appellant,

v.

STATE of Florida, Appellee.

No. 49612.

Supreme Court of Florida.

April 1, 1982.

Rehearing Denied June 7, 1982.

Upon conviction of defendant for two murders and imposition of the death sentence, the Supreme Court, 366 So.2d 19, affirmed the convictions but vacated the death sentence and remanded for resentencing. On remand, the Circuit Court, Dade County, Leonard Rivkind, J., again imposed a death sentence, and defendant appealed. The Supreme Court held that: (1) where defendant did not object at first sentencing hearing to remarks by prosecutor urging jury to find several delineated aggravating circumstances, some of which were nonstatutory, where defendant failed to argue, in his first appeal, that the jury's recommendation for death penalty was tainted by its consideration of improper aggravating circumstances, and failed again to make the argument on remand for reconsideration of the sentence, the argument could not be raised for the first time on appeal from that remand; (2) trial judge expressly stated that he considered all testimony and evidence presented in imposing death sentence on remand, and there was no indication from record that he limited his consideration of mitigating factors to only those which are statutorily enumerated, refuting contention by defendant that trial judge failed to consider certain evidence introduced by defendant during resentencing proceeding to demonstrate nonstatutory mitigating factors; and (3) imposition of death sentence did not violate Eighth and Fourteenth amendments of Federal Constitution.

Affirmed.

Boyd, J., dissented and filed statement.

1. Criminal Law ⇐1037.1(2)

Where defendant challenging his death sentence did not object at first sentencing hearing to remarks by prosecutor urging jury to find several delineated aggravating circumstances, some of which were nonstatutory, where defendant failed to argue, in his first appeal, that the jury's recommendation for death penalty was tainted by its consideration of improper aggravating circumstances, and failed again to make the argument on remand for reconsideration of the sentence, the argument could not be raised for the first time on appeal from that remand.

2. Criminal Law ⇐824

Where jury was properly instructed at sentencing hearing with respect to making its recommendation, fact that jury was urged by prosecutor to find certain aggravating circumstances, some of which were nonstatutory, did not establish that the jury's recommendation was tainted.

3. Criminal Law ⇐1208(1)

Trial judge expressly stated that he considered all testimony and evidence presented in imposing sentence of death on remand, and there was no indication from record that he limited his consideration of mitigating factors to only those statutorily enumerated, refuting contention by defendant that trial judge failed to consider certain evidence introduced by defendant during resentencing proceeding to demonstrate nonstatutory mitigating factors.

4. Criminal Law ⇐984.5(1)

It lies within province of sentencing judge to decide whether a particular mitigating circumstance is proven and the weight to be given it.

5. Constitutional Law ⇐270(1)
Criminal Law ⇐1213

Imposition of death sentence upon defendant for murder did not violate the Eighth and Fourteenth Amendments of the Federal Constitution. U.S.C.A.Const. Amends. 8, 14.

Bennett H. Br...ner, Public Defender and Karen M. Gottlieb and Elliot H. Scherker, Asst. Public Defenders, Eleventh Judicial Circuit, Miami, for appellant.

Jim Smith, Atty. Gen., and Miguel A. Olivella, Jr. and David P. Gaulden, Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

Wardell Riley appeals his sentence of death which was imposed after remand by this Court for reconsideration of imposition of the death sentence. Finding no reversible error, we affirm the sentence of death.

For the purpose of robbing his place of employment, Riley and another entered the business establishment of Riley's employers and shot three persons, killing two of them. The third survived and testified to Riley's participation in the crimes. At the sentencing hearing, neither the State nor the defense presented any additional evidence than what had already been presented to the jury and received in evidence. Rather, the prosecutor argued the existence of certain aggravating factors while the defense argued the existence of mitigating factors and the barbarism of imposing the death sentence. No objection was made by defense counsel to the State's argument. The jury recommended that Riley receive a sentence of death for one of the murders and a sentence of life for the other murder. Finding six aggravating factors and one mitigating, the trial court sentenced Riley in accordance with the jury's recommendations. It additionally imposed a fifteen-year sentence for felonious assault of the third person who was shot but who did not die.

On appeal, we affirmed the convictions as well as Riley's life and fifteen-year sentences, but we vacated the death sentence and remanded for resentencing by the trial judge because he had erroneously considered two nonstatutory aggravating circumstances (no showing of remorse and the length of premeditation), because he had erroneously determined that the murder was heinous and cruel, and because he had improperly doubled up the aggravating circumstances of for...ntary gain and during the course of a robbery. We held that the latter circumstances should be treated as one aggravating circumstance and that the court properly found as an aggravating circumstance that the murder was committed to eliminate a witness and thereby avoid lawful arrest. *Riley v. State*, 366 So.2d 19 (Fla.1978).

Upon remand and after an additional sentencing hearing, the trial judge again imposed the sentence of death. He found as aggravating circumstances that (1) the murder was committed while Riley was engaged in the commission of a robbery and was committed for pecuniary gain and (2) the murder was committed to avoid or prevent a lawful arrest. In mitigation, he found that Riley had no significant history of prior criminal activity.

[1] Riley challenges his death sentence on three bases. First, he argues that the jury's recommendation which is entitled to great weight was tainted by its consideration of improper aggravating circumstances. His argument is premised on the fact that the prosecutor in the sentencing phase of the trial urged the jury to find several delineated aggravating circumstances, some of which were nonstatutory. No objection was made by defense counsel to these remarks by the prosecuting attorney during the first sentencing hearing, however. Furthermore, Riley failed to make this argument to this Court in his first appeal. When we remanded for reconsideration of the sentence by the trial judge, Riley again failed to make this argument in his petition for rehearing. During the resentencing procedure, Riley never argued to the trial court that the jury's recommendation may have been tainted. Riley cannot now raise this point on appeal.

[2] Moreover, even if this issue was properly before us, we would find that Riley has failed to demonstrate that the jury's recommendation was tainted. There is no question that the jury was properly instructed at the sentencing hearing, and just

because the jury was urged by the prosecutor to find certain aggravating circumstances does not establish that the jury's recommendation was tainted. The record does not reveal that the jury based its recommendation on improper considerations.

[3, 4] We reject Riley's contention that the trial judge failed to consider certain evidence introduced by Riley during the sentencing proceeding to demonstrate nonstatutory mitigating factors. The trial judge expressly stated that he considered all the testimony and evidence presented. Furthermore, there is no indication from the record that he limited his consideration of mitigating factors to only those which are statutorily enumerated. Because he failed to find the mitigating factors which Riley urged does not mean that he did not consider the evidence. It lies within his province to decide whether a particular mitigating circumstance is convincing or persuasive and the weight to be given it. *Smith v. State*, 407 So.2d 894 (Fla.1981); *Lemon v. State*, 398 So.2d 1140 (Fla.1979). Here, we find no error in his decision.

[5] Finally, we find no merit to Riley's argument that to impose a sentence of death upon him would violate the eighth and fourteenth amendments of the federal constitution. This argument is premised for the most part on his preceding arguments and on the additional ground that a personal factor in mitigation here is the possibility of his insanity.

Having reviewed the entire record, we find that the trial judge properly imposed the sentence of death, and we affirm.

It is so ordered.

SUNDBERG, C. J., and ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., concur.

BOYD, J., dissents: I would reduce penalty to life imprisonment.

Bobby Marion FRANCIS, Appellant,

v.

STATE of Florida, Appellee.

No. 62222.

Supreme Court of Florida.

April 15, 1982.

Defendant was convicted in the Circuit Court, Monroe County, Richard S. Fuller, J., of first-degree murder and sentenced to death and he appealed. The Supreme Court, Alderman, J., held that rule of criminal procedure providing that defendants shall be present during challenging of jury was violated, where defense counsel, the prosecutor, the judge and the court reporter retired to jury room to exercise defendant's and state's peremptory challenges, but counsel told defendant he could not go with him into the jury room, even though counsel had not obtained defendant's express consent to challenge peremptorily in his absence and defendant was entitled to new trial.

Reversed and remanded for new trial.

Adkins and Boyd, JJ., dissented.

1. Criminal Law ⇐636(1)

Defendant had constitutional right to be present at stages of his trial where fundamental fairness might be thwarted by his absence.

2. Criminal Law ⇐636(3), 1166.16

Rule of criminal procedure providing that defendants shall be present during examination and challenging of jury was violated, where defense counsel, prosecutor and judge retired to jury room to exercise peremptory challenges, but defendant was told he could not go into jury room, although counsel had not obtained defendant's express consent to challenge peremptorily in his absence, and, where extent of resulting prejudice could not be assessed

IN THE SUPREME COURT OF FLORIDA

CASE NO. 49,666

MARDELL RILEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING

The appellant, by and through undersigned counsel, hereby moves for rehearing of the above-styled cause and as grounds therefor states:

1. On appeal there has been no dispute but that six of the eight aggravating factors argued by the prosecutor were improper. The decision of this Court holds, however, that the contention that the jury sentencing recommendation was consequently tainted cannot be raised for the first time on this appeal. (Slip Opinion at 2-3). In so holding, the Court overlooks the decision of Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977), in which the Court recognized that the dictates of Proffitt v. Florida, 428 U.S. 272 (1976), require consideration of this type of constitutional error (presentation of non-statutory aggravating factors) even absent objection.

2. In the decision at bar, the Court holds that "Riley has failed to demonstrate that the jury's recommendation was tainted." (Slip Opinion at 3). In so holding, this Court overlooks Florida's long-standing rule that, given improper prosecutorial argument,

> the question is whether or not the court can see from the record that the conduct of the prosecuting attorney did not prejudice the accused, and unless this conclusion can be reached the judgment must be reversed. (e.s.).

McCall v. State, 120 Fla. 707, 163 So. 38, 46 (1935); accord Pait v. State, 112 So.2d 380, 385 (Fla. 1959); Thompson v. State, 318 So.2d 549, 552 (Fla. 4th DCA 1975); Chaves v. State, 215 So.2d 750 (Fla. 2d DCA 1968). The Court further overlooks the Supreme Court's standard of review of this type of constitutional error,

which standard places the burden upon the state to establish beyond a reasonable doubt that the defendant was not harmed by the improper prosecutorial argument. See, e.g., Chapman v. State of California, 386 U.S. 18, 24 (1967).

In shifting to the appellant the burden of demonstrating that the jury recommendation was tainted, this Court also overlooks the decision of Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977), which holds, consistent with the aforementioned precedents, that where it cannot be assuredly ascertained that the sentencing recommendation of the jury would not have been different but for the impermissible aggravating factors, a new jury sentencing proceeding is required.

4. In holding that the appellant had demonstrated that the trial judge was impermissibly prejudiced by the prosecutorial argument but failed to demonstrate that the jury was so prejudiced, this Court overlooks the presumption in Florida capital punishment law that trial judges experienced in sentencing serve to correct deviations from law likely by jurors susceptible to the passionate pleas of a prosecutor. See Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976); State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

5. In holding that "there is no question that the jury was properly instructed at the sentencing proceeding" (Slip Opinion at 3), the Court overlooks the contrary contention of the appellant presented in the Initial Brief of Appellant at 14 and 22. Additionally, in focusing upon the jury instructions in concluding that Riley has failed to demonstrate jury taint, this Court overlooks the fact that the trial judge who delivered the instructions erroneously relied in his sentencing order upon four of the six improper aggravating factors urged by the prosecutor. To require an appellant to present a clearer demonstration of jury prejudice than that demonstrated by this record is to impose a new requirement in the capital sentencing procedure of specific jury sentencing findings or post-trial interviews of jurors.

6. In holding that there is no indication from the record

that the trial judge limited his mitigatory consideration of the sentencing evidence to the statutory mitigating factors, this Court overlooks the references by the trial judge to his consideration of the mitigating circumstances provided under the Florida statute (S.R. 2; D. 19-20), and the argument of the prosecutor in this regard. (Tr. 36). The decision also fails to consider that there was extensive non-statutory mitigating evidence presented which is totally unmentioned in the findings by the trial court. (Tr. 8-31; D. 13-17, 19-20).

7. In upholding the sentencing findings of the trial court on mitigation, this Court overlooks that specific written findings of fact are required for meaningful appellate review. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973); Section 921.141(3), Florida Statutes (1975). This Court heretofore has construed this requirement as mandating that a trial court specify the factors weighed and has depended upon the findings of the trial court in assessing whether sentencing evidence was properly considered or rejected. Quince v. State, ____So.2d____ (Fla. 1982)(Case No. 59,954, Opinion filed 3/4/82); Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980).

While it is for the trial court to determine the weight to be given mitigating evidence, the sentencing findings of fact approved by this Court reflect that the non-statutory mitigating evidence was given no weight. In upholding the sentencing order nevertheless, this Court overlooks the recent decision of the Supreme Court in Eddings v. Oklahoma, ____U.S.____, 102 S.Ct. 869 (1982). There the Court, in applying the doctrine of Lockett v. Ohio, 438 U.S. 586 (1978) to facts strikingly similar to the case at bar, held that the sentencers "may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Eddings v. Oklahoma, ____U.S.____, 102 S.Ct. 869, 876 (1982). In light of the references by the trial court to the statutory mitigating factors, and the total omission of findings of fact regarding the non-statutory mitigating evidence presented, the concurring opinion in Eddings is particularly apposite:

> Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605, 98 S.Ct., at 2965.
>
> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Id. at 878 (O'Connor, J., concurring).

WHEREFORE, the appellant respectfully moves for rehearing in this case.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125

BY: Karen M. Gottlieb
KAREN M. GOTTLIEB
Assistant Public Defender

and

ELLIOT H. SCHERKER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to JIM SMITH, ATTORNEY GENERAL, The Capitol, Tallahassee, Florida 32304 this 15th day of April, 1982.

Karen M. Gottlieb

KAREN M. GOTTLIEB
Assistant Public Defender

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IN THE SUPREME COURT OF FLORIDA

WARDELL RILEY,	)	
Appellant,	)	
v.	)	CASE NO.
STATE OF FLORIDA,	)	
Appellee.	)	
	)	

RESPONSE

Comes now the State of Florida, by and through the undersigned Assistant Attorney General, responds to Appellant's Motion for Rehearing and states as follows:

1. Much, if not all, of Appellant's Motion for Rehearing rehashes argument originally raised and presented to this Court in either the direct appeal or in the second review of his sentence of death, issued by this Court April 1, 1982. It's difficult to see how this Court overlooked Elledge v. State, 346 So.2d 998 (Fla. 1977) as it was extensively cited in Appellant's initial brief on resentencing (at Pages 12, 13, 15, 22, and 23) and Appellant's reply brief on resentencing (at Pages 2, 3, 4, 7, 8 and 9).

2. Appellant's reliance upon Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) is improvident, particularly because Appellant relies upon a concurring opinion, which does not have the force of law. In Eddings, the mistake committed by the trial judge was that he " . . .did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that as a matter of law he was unable even to consider the evidence." (Emphasis in original). Id. at 71 L.Ed.2d 10.

3. Here, unlike Eddings v. Oklahoma, the mitigating circumstances presented by Appellant were properly considered and rejected:

> We reject Riley's contention that the trial judge failed to consider certain evidence introduced by Riley during the resentencing proceeding to demonstrate nonstatutory mitigating factors. The trial judge expressly stated that he considered all the testimony and evidence presented. Furthermore, there is no indication from the record that he limited his consideration of mitigating factors to only those which are statutorily enumerated. Because he failed to find the mitigating factors which Riley urged does not mean that he did not consider the evidence. It lies within his province to decide whether a particular mitigating circumstance in sentencing is proven and the weight to be given it. Smith v. State, No. 55,961 (Fla. Nov. 12, 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979). Here, we find no error in his decision.
>
> Slip opinion at 3.

WHEREFORE, based on the foregoing arguments and authorities, Appellant's petition for rehearing should be summarily denied.

Respectfully submitted,

JIM SMITH
Attorney General

BY: David F. Gauldin
DAVID F. GAULDIN
Assistant Attorney General

The Capitol, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mr. Bennett H. Brummer, Public Defender, Eleventh Judicial Circuit, 1351 NW 12 Street, Miami, FL 33125 by U.S. Mail this 20th day of April, 1982.

David F. Gauldin
DAVID F. GAULDIN

IN THE SUPREME COURT OF FLORIDA

MONDAY, JUNE 7, 1982

WARDELL RILEY,	**	
Appellant,	**	CASE NO. 49,666
vs.	**	Circuit Court Case No. 75-9066 (Dade)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the Motion for Rehearing filed by attorneys for appellant, and response thereto

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

SUNDBERG, C.J., ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., Concur
BOYD, J., Dissents

A True Copy

Test:

Sid J. White
Clerk Supreme Court

By: Debbie Carnesale
Deputy Clerk

cc: Hon. Richard P. Brinker, Clerk
Hon. Leonard Rivkind, Judge
Karen M. Gottlieb, Esquire
and Elliot H. Scherker, Esquire
David P. Gauldin, Esquire

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

THE STATE OF FLORIDA,

Plaintiff

v.

WARDELL RILEY,

Defendant

CASE NO. 75-9066

FINDINGS IN SUPPORT OF DEATH PENALTY

This cause came before the court for reconsideration of the death sentence pursuant to the opinion and mandate of the Supreme Court of Florida. Riley v. State, 366 So 2d 19 (Fla. 1978). The defendant was present and represented by the office of the public defender. The State and the defendant were afforded the opportunity to present testimony and evidence relevant to the sentence. After having considered all the testimony, evidence and arguments which have been presented, and having considered the provisions of Section 921.141 Florida Statutes, and having considered the opinion of the Supreme Court, the court, independent of, but in agreement with the advisory sentence of the jury does hereby impose the death penalty upon the defendant, Wardell Riley. The court finds that the aggravating circumstances of this case, beyond a reasonable doubt, outweigh the mitigating circumstances. In support of this determination, the court makes the following findings:

As to the aggravating circumstances:

1. The first degree murder was committed while the defendant was engaged in the commission of a robbery (Section 921.141(5)(d) Florida Statutes) and was committed

for pecuniary gain. (Section 921.141 (5)(b) Florida Statutes). This constitutes only one aggravating circumstance. Provence v. State, 337 So 2d 783, 786 (1976) and Riley v. State, supra. The defendant stole at gun point money, jewelry and other personal property.

2. The first degree murder was committed for the purpose of avoiding or preventing a lawful arrest. The defendant was an employee of the victim. The victim was bound and gagged and thereby rendered helpless during the course of the robbery. The conclusion is inescapable that the victim was executed to avoid identification and arrest.

There are no other aggravating circumstances.

As to the mitigating circumstances:

1. The defendant has no significant history of prior criminal activity. (Section 921.141 (6)(a) Florida Statutes).

There are no other mitigating circumstances.

Accordingly, the crime committed in this case warrants the imposition of the death penalty. The defendant is remanded to the custody of the Department of Offender Rehabilitation for the purpose of carrying out the sentence of death imposed by the court at a time and by such manner as is prescribed by law.

ORDERED at Miami, Florida, this 20 day of April, 1979.

LEONARD [illegible]

CIRCUIT JUDGE

Copies furnished:

Office of State Attorney
Office of Public Defender

BENCH DOCKET

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY
STATE OF FLORIDA

APR 19 1979
RICHARD P. BRINKER
CLERK

VS

WARDELL RILEY

CHARGE, FIRST DEGREE MURDER, ETC. Case No. 75-9066

What have you to say why sentence should not now be imposed upon you?
Saying nothing that could influence the Court in its decision.

SENTENCE

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that as to Count One of the Indictment you WARDELL RILEY be sentenced to DEATH BY ELECTROCUTION, AS AUTHORIZED BY SECTION 775.082 (1) OF THE FLORIDA STATUTES, credit to be given you for time served in the DADE COUNTY JAIL and the STATE PENITENTIARY prior to sentencing, to-wit: ONE THOUSAND THREE HUNDRED and TWELVE (1,312) DAYS.

DONE AND ORDERED in open Court at Miami, Dade County, Florida, this 19th day of APRIL A. D. 19 79

LEONARD RIVKIND Judge.

RECORDED
JUN 1 1979
RICHARD P. BRINKER
CLERK

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CR/C1/CR-58

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 75-9066

THE STATE OF FLORIDA,

Plaintiff,

vs.

WARDELL RILEY,

Defendant.

Excerpt transcript of proceedings had before The Honorable LEONARD RIVKIND, Circuit Court Judge, in the Metropolitan Justice Building, 1351 Northwest 12th Street, Miami, Dade County, Florida, on April 8th, 1976, commencing at or about 1:00 p.m.

APPEARANCES:

RICHARD E. GERSTEIN, ESQ.
State Attorney
(Attorneys for the State)
1351 Northwest 12th Street
Miami, Florida
By: TERRY McWILLIAMS, ESQ.,
Assistant State Attorney

POLLACK, TUNKEY, ROBBINS,
ROTH & WEINER, ESQS.
(Attorneys for the Defendant)
1700 Northwest 7th Street
Miami, Florida
By: FRED ROBBINS, ESQ.

(Whereupon, the following proceedings were had:)

. . . . . .

THE COURT: All right, sir.

Is there anything further?

Peter V. Enea had a right to live. Robert C. Lisenby had a right to live. They had a right to the society and companionship of their family and friends and their family and friends had a right to their society and companionship.

With their hands bound, helpless to resist, they were systematically executed.

Miraculously Peter A. Enea survived the attempt on his life with resulting disability.

I have searched in vain for sufficient mitigating circumstances under the law which would justify a sentence other than the death penalty in this case.

However, the aggravating circumstances clearly outweigh the mitigating circumstances.

The only mitigating circumstances under Florida Statute is the fact that the Defendant had no prior criminal conviction.

The aggravating circumstances are two murders and another intended. Furthermore, the length

MARTIN E. LEBHAW
OFFICIAL COURT REPORTERS, CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
MIAMI, FLORIDA 33130
TEL. (305) 579-7586

of premeditation was great. Since the victims could identify the Defendant, as their fellow employee, their elimination as witnesses must have been part of the plan of armed robbery.

The victims were helpless and offered no resistance. The crimes were committed for pecuniary gain.

The Defendant has shown no remorse. He returned home, changed his clothes, and went to the dog track for the evening.

The Defendant was 27 years old at the time and had the benefit of one year of college. If anything, his age and education are aggravating, not mitigating circumstances.

These were terribly cruel, ruthless and heinous crimes.

The sentences which the Court will now impose are to be served consecutively.

The Defendant will be permanently isolated from society in the event the death penalty is set aside by appellate authority.

It is the sentence of the law and the judgment of the Court that you, Wardell Riley, for your crime of first degree murder of Peter V. Enea,

MARTIN E. LEBHAW
OFFICIAL COURT REPORTER, CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
MIAMI, FLORIDA 33130 TEL. (305) 372-7295

Count I of the Indictment, for which you now stand convicted, suffer the penalty of death by electrocution, that for your crime of first degree murder of Robert Lisenby, Jr., Count II of the Indictment, for which you now stand convicted, you be imprisoned for the rest of your natural life, that for your crime of assault with the intent of first degree murder of Peter A. Enea, Count III of the Indictment, which you now stand convicted of, you be imprisoned for fifteen years.

The sentences are to run consecutively.

The entire record will be certified to the Supreme Court of Florida for review within sixty days in accordance with the law.

The court reporter is directed to transcribe and separately bind these findings and judgment of the Court which will constitute the written findings required by law.

May God have mercy on your soul.

MR. McWILLIAMS: Count II, that is life with no parole in 25 years.

THE COURT: That is correct.

(Whereupon, the sentencing was concluded.)

MARTIN S. LEDHAW
OFFICIAL COURT REPORTERS, CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
MIAMI, FLORIDA 33130 TEL. (305) 373-7926

CERTIFICATE

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, MARGUERITE DiMATTEO, Court Reporter and Notary Public, hereby certify that I was authorized to report the excerpt transcript of hearing before The Honorable LEONARD RIVKIND, Circuit Court Judge, on April 8th, 1976; that the within transcript, pages 1 through 4, represents a true and accurate record of my shorthand notes taken at that time.

DATED at Miami, Florida, this 29 day of July, 1976.

Marguerite DiMatteo
COURT REPORTER

MARTIN B. LESHAW
OFFICIAL COURT REPORTER, CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
MIAMI, FLORIDA 33128
TEL. (305) 372-7998

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

CRIMINAL DIVISION

CASE NO. 75-9066

STATE OF FLORIDA,

Plaintiff,

vs.

WARDELL RILEY,

Defendant.

Transcript of proceedings had before The Honorable LEONARD RIVKIND, Circuit Court Judge, in the Metropolitan Justice Building, Miami, Florida, on April 19th, 1979, commencing at or about 1:00 o'clock p.m.

APPEARANCES:

JANET RENO, State Attorney
1351 Northwest 12th Street
Miami, Florida 33125
BY: HENRY ADORNO, ESQUIRE
Assistant State Attorney
On behalf of State of Florida.

BENNETT H. BRUMMER, ESQUIRE
Room 800 - 1351 Northwest 12th Street
Miami, Florida 33125
BY: PAUL MORRIS, ESQUIRE
Special Assistant Public Defender
1428 Brickell Avenue - Suite 500
Miami, Florida 33131
On behalf of Defendant.

PRESENT: IRA H. LOEWY, ESQUIRE
Assistant State Attorney.

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WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
[By Mr. Morris].				
Collin Turnbull	6	15	20	--
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Gene Johnson	23	--	--	--
Emma Holmes	26	--	--	--
Martha Riley	27	--	--	--
Minna Riley	30	--	--	--
[By Mr. Adorno]				
Peter A. Aneer	33	--	--	--

NEW YORK
NATIONAL REPORTING SERVICE
MARTY LESHAW
OFFICIAL COURT REPORTER
CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, DADE COUNTY, FLA.
MIAMI

[Whereupon, the following proceedings were had:]

THE COURT: Wardell Riley.

Mr. Riley, would you please come forward.

All right.

Would you gentlemen announce your appearances, please?

MR. MORRIS: My name is Paul Morris, Special Assistant Public Defender on behalf of Wardell Riley.

MR. LOEWY: Ira Loewy, Assistant State Attorney for the State, and Mr. Adorno.

THE COURT: All right.

Now, the death penalty was imposed as to which Count, Mr. Clerk?

Was it Count I?

THE CLERK: Yes, Your Honor.

THE COURT: All right.

Has that now been vacated in accordance with the mandate as yet?

THE CLERK: No.

THE COURT: In accordance with the mandate of the Supreme Court of Florida, sentence imposed on Count I in the case of State of Florida v. Wardell Riley is vacated.

Is there any legal reason why sentence should not be pronounced?

MR. MORRIS: No, Your Honor, but we do have argument

and testimony.

THE COURT: All right, sir.

I will hear testimony from the defendant and from the State, and then I will hear from the defendant again.

MR. MORRIS: Thank you, Your Honor.

Take a seat.

As the State knows, as Your Honor knows, we filed a memorandum. I hope one was received, a memorandum of the outline.

THE COURT: I received one from the State and one from the --

MR. ADORNO: We did, Your Honor.

THE COURT: One from the State and one from the Public Defender, and I have reviewed both.

Proceed.

MR. MORRIS: We filed the memorandum which very briefly outlines the law and the facts in this particular case, and would support imposition of a sentence of life imprisonment.

Briefly, there are two major points to the memorandum, and we hope to amplify on that today.

The first point is basically that despite the jury finding in this case, the facts in this unusual case, give rise to a doubt as to Mr. Riley's involvement in the crime, and as supported by Justice Boyd's descent,

and as supported recently by a letter, an unsolicited letter that we received by a prisoner in Florida State Prison that I referred to in a memorandum which I'd like to offer as an exhibit into evidence as our first exhibit in support of the descent in that case, and I don't think there is any need to go any further into that issue at this time. It's very much outlined in our memorandum.

Secondly, the second crucial issue is a little more of a legal issue which pertains to the Florida Capital Sentencing Statute, and that is that we submit that the mitigating circumstances which include the evidence as portrayed by Justice Boyd in his descent outweighed the two statutory aggravating circumstances which were found to be appropriate by the Supreme Court of Florida which the State if limited to as far as aggravating circumstances are concerned.

The issue boils down to, in this case, in a capital case when the character and the record of Wardell Riley renders execution inappropriate. We have testimony from one expert character witness and testimony from the family members that we would like to put on in support of the mitigating circumstances which we submit outweigh the aggravating in this case, and we are ready to proceed.

THE COURT: Proceed.

MR. MORRIS: Mr. Collin Turnbull. Mr. Turnbull.

THE COURT: Swear the witness, please.

Whereupon --

COLLIN TURNBULL

was called as a witness and, after having been first duly sworn, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. MORRIS:

Q Would you please state your name?

A Collin Turnbull.

Q Mr. Turnbull, what is your present residence address?

A Lancaster County, Virginia.

Q What is your place of birth?

A England.

MR. MORRIS: Would you prefer that he testify from here as opposed to the stand, Your Honor?

THE COURT: Are you comfortable there, sir?

THE WITNESS: Yes, that's fine.

Q [By Mr. Morris] How are you presently employed?

A I am a Professor of Anthropology at George Washington University.

Q And would you briefly apprise the Court of the degrees you presently hold?

A I have got five degrees from Oxford University.

The highest degree is Doctor of Philosophy.

Q Have you ever been called as an expert witness in any other prior capital cases?

A Yes, a few.

Q Where were those cases?

A Raleigh, North Carolina and Richmond, Virginia.

Q And you are a Professor of Anthropology; is that correct?

A Yes.

Q Could you explain briefly to the Court the nature, in general, of your anthropological research and contrast it to psychological research?

A In anthropology, social anthropology, we are primarily concerned with human behavior and the forces that lead to order or disorder in society in terms of interpersonal relationships or intergroup relationships, and our method differs from sociology and psychology because instead of surveys, questionaires of extensive levels, we prefer a long period of intensive and very intimate relationships with the people or groups that we study.

Q Have you developed such a personal relationship with the defendant, Wardell Riley, for the purpose of your anthropological research?

A Yes.

He was one of the first I met when I began my

research on rehabilitation and security in prison about two years ago, and I met Wardell Riley on a number of occasions.

We have had long and intensive interviews, and I have maintained a correspondence for nearly two years, about one letter a week almost.

Q How did this come about, your acquaintanceship?

A Professionally as an anthropologist, a number of us are trying to get more into looking at social problems in our own country rather than focusing more on other cultures.

Q How did this specifically come about in Florida, your involvement in Florida?

A I was doing some work in Georgia on persons there, and then I met someone who was able to give me an introduction to the State Prison, so I did some research there, and I interviewed a number of inmates, and then I came back again the following summer in the Research Division of Corrections gave me permission to continue with an increasing number of inmates.

Q Mr. Turnbull, can you estimate approximately the number of hours you have spent with Mr. Riley in interviews and the number of letters that have passed between you in terms of correspondence?

A Letters, about one a week, I should think we have exchanged.

Q Since what time?

A For almost two years, something better than eighteen months.

Q And approximately how many hours over that two-year period have you spent in interviews with Mr. Riley?

A I have only been here on two occasions. The first occasion probably about six hours, the second occasion I had a series of interviews on different days, and I structured them at different times of the day because sometimes the time of day can make a difference to the mood of someone that you are talking with.

This way we get a better feel if we are limited in time. I should think about 24 hours of actual intensive interviewing.

Q Now, you are concerned here today, Mr. Turnbull, with the character and the record of Mr. Riley, and whether the nature of his character justifies the imposition of the death penalty or justifies the imposition of a sentence of life imprisonment.

Now, based upon your expertise, your opportunities to correspond with Mr. Riley, and your intensive interviews with Mr. Riley, have you formed any opinion as to his character and his record as regards that sentencing issue which is before the Court today?

A Yes. I think I can do that.

Q. Would you please tell the Court what sort of opinions you have come to as relates to Mr. Riley's character?

A. Well, the first opinion is based on the fact that looking at the correspondence, the transcripts of my interviews we can assess our own field work pretty fairly as to whether it is reliable or not, and I think the relationship I have had with Mr. Riley and with his family -- because I try to go beyond the immediate -- is sound evidence as far as I am concerned as an anthropologist.

With regard to how this relates to his character and that in relationship to the death sentence, I would say that in judging whether someone should be given the death sentence or not, where there is an option, my personal belief is that I would look at what likelihood there was that person, if he were given an irrevocable life sentence of spending whatever it is in Florida, a minimum of twenty-five years?

Q. Yes.

A. In prison, what is the likelihood of his being a constructive member of prison population.

Q. Perhaps this would be good time to ask you, could there be some circumstances where, under the law, after speaking with the defendant you would come to the conclusion that the character would be appropriate for the imposition

of the death penalty?

A I think there could be, yes.

Q Under the circumstances --

A I wouldn't like it, but I think there could be.

Q Under the circumstances of Mr. Riley's case?

A No, definitely not. As I say, in looking at anyone and looking at Mr. Riley in particular, I tried to assess what is the likelihood of his being a constructive member of prison population under a long period of time which is crucial, and the evidence I would look at there would be fourfold.

This is in the theory of anthropology.

For looking for ordered social behavior, we would look first of all at family because if in childhood we see, in all societies we have studied, someone does not develop a sense of mutual responsibility and obligation within the family, there is not much likelihood of his having an inner emotional sense of responsibility in adulthood.

It then merely becomes an intellectual thing, we are told, to behave in an ordered way, and we do or we don't, but if you learn it in the family, it then sets the obligations, and then is expanded to the wider society.

Looking at Mr. Riley I see that very clearly because I have got to know his family, and I see a very clear set of responsibilities over Mr. Riley towards his

family in spite of his inability to care for them financially, and the kind of things that he has asked me to do -- he has never asked me any favors except for favors relating to his family.

For example, to get some greeting cards for Mother's Day or birthdays, Christmas cards, things of that sort.

The second thing we would look at would be education because with this emotional background, the social responsibility in the family, it then needs to become intellectualized if we are really going to have social order.

Where we are going to have a social ability to understand the social process of reciprocal obligations, the fact that we have duties in societies as well as privileges, and he has got to have, thirdly, the intellectual ability, and this is the ideal that any individual should have, the intellectual ability to incorporate into his social system those things that are distasteful to him with which he might disagree.

As I say, I don't have to like you, but I have to have the ability of incorporating you into my social system of reciprocal obligations regardless of whether I like you or what you do.

The fourth criteria by which we would assess the

likelihood of social order arising from inside rather than being caused from outside, the fourth and perhaps the most important category is religious belief which then makes a sense of this total system which enables someone to adjust to changing circumstances, and which gives a significance and purpose to life beyond that of individual survival.

The biggest danger to disorder is when self-interest is placed above social interest.

Under those four categories that we traditionally look at, from all the evidence I have, I think Mr. Riley would be a very constructive member or could be a very constructive member of society, and I think from what I have seen in correspondence and discussion with the prison officials, his relationship with other inmates, with prison officers shows that this is possible.

Q How does the relationship of Mr. Riley with prison officials, administrators, and other prison inmates support your conclusion?

A Well, Mr. Riley and I have crossed swords in correspondence sometimes. We disagree about some things. I try and take an anthropological approach and try to explain some of the rules of prisons that are very distasteful, but to try and see if Mr. Riley can't also accept that some of those rules do have a basis however much he dislikes them.

It seems to me he is very willing to consider such a possibility. I have never, for instance, seen or in correspondence had any indication of a real hostility. I have certainly found a dislike of his situation, but I found a dislike of things that people do or are said to do, but I haven't found this manifested as any personal antagonism against individuals.

Q And finally, what have you discerned about his attitude towards his own fate is concerned?

A I have talked to a lot of people on death row in a number of different prisons in different states. Some of them are very concerned, some of them are not.

Again, there is enormous consistency in Mr. Riley's case which is something we look for if there is a consistency between what they say and do, then there is evidence worth considering. If there is inconsistencies we are very unhappy, but in two years of correspondence I haven't been able to find any significant flaw.

With regard to his attitude towards his own fate, he is always, although he never makes a point of it, but he has always maintained his innocence. So he feels that he is being possibly put to death or punished unjustly.

I find no bitterness there, but his main concern whenever we talk about this possibility -- we have talked frankly about it -- is mainly a concern for his mother and

for his wife and family, and we have our ways of checking up on whether we are being put on.

I mean this is our profession, and I believe it, I frankly do. I believe his concern is not so much for his own fate, I think he is also concerned about other inmates before himself.

MR. MORRIS: Thank you, sir.

I have no further questions at this time.

THE COURT: Mr. Adorno?

CROSS-EXAMINATION

BY MR. ADORNO:

Q Doctor, are you in favor or against the death penalty?

A Every culture that I know has it, and I accept it as a structural necessity, to put it in anthropological terms.

Q I am not asking you to accept it. Do you favor it? Do you believe in the death penalty, you personally, not whether this Court does?

A If you are not asking me whether I like it or dislike it under certain circumstances, yes. I think it is necessary.

Q Have you ever dealt with an individual whom you felt deserved to die?

A Yes, I have. You are talking about in the Court

system?

Q That you have dealt with that you have examined or that you have dealt with on a correspondence basis?

A Yes.

Q Now, you only came into contact with Wardell Riley after he received the death penalty and was placed on death row?

A Yes.

Q You indicate there were four things that you believe that lead you to conclude that Mr. Riley should deserve life as opposed to death?

A Yes.

Q One is family?

A Yes.

Q Is there any difference with his family now than it was before he received the death penalty?

A That I can only go by what I have learned from talking with his family because I didn't know his family before he received the death penalty.

Q Do you think his family loves him?

A I would think just about the same kind of relationship, a little bit more concerned.

Q There was love on behalf of his parent or his immediate family before him?

A Certainly.

Q That would have existed prior to the time he committed the act for which he got the death penalty?

A As far as I know, his mother is certainly there.

Q Now, with respect to education. I didn't quite pick up on that. What did you mean by that?

A What we are looking for is how order is maintained, not when it is coerced by a legal system which is one way of maintaining it, but if that is to be really successful and powerful, then there must also be an inner coercion, and to us in anthropology it is important to us also and part of the inner coercion comes from the family relationship which establishes reciprocal social relationships and obligations, but then it has to be intellectualized.

So then you have to have the education by which you understand this system as it is set out in law and in custom.

Q So when you are put behind bars and you are told what to do everyday, that kind of teaches you what you can and what you can't do?

A I am talking about an education in school, to start with, courses in civic responsibility.

Q Has he received that at Raiford while he has been sitting, waiting around?

A At Raiford?

Q Or wherever he has has been for the last two years.

A No. In prison, yes, I think prison must be a very educational experience, but that would come under my third category of intellect and ability to adjust to a situation with which you do not agree and to have the intellect and ability to understand it without judging it as right or wrong, a kind of intellectual ability to be detached.

Q And the third item was reciprocal obligation?

A No.

That was part of the first.

Q What's your third one then?

A The third item is intellect.

Q Is it part of education when you are talking about duties and responsibilities?

A Yes.

Q That we do have certain duties and responsibilities to the system?

A Yes. We learn that in first and second level.

Q First of all, do you believe him when he tells you he is innocent?

A I don't have enough evidence. I haven't read the transcript, and it's not my business in anthropology to be concerned with that.

My personal hunch rather than belief is yes, I tend to believe him.

Q If he is guilty, shouldn't he have a responsibility

to come forward and tell the Court and tell the prosecutor who the other people are that were involved with him?

A If he is guilty, yes. I would certainly say so.

Q Has he done that?

A No, he hasn't as far as I know. I presume because he would explain that as being not guilty, but if he were guilty and he did not do that, then I would be surprised.

Q A person who didn't do that would be a person who would be more likely to deserve death because he obviously has no responsibility or no understanding of what the system is about after he has been committed.

A I would say no responsibility. If I had committed murder and others were involved I might place my loyalty to my friends higher than my loyalty to society.

Q Wouldn't that be a distorted view?

A Yes. That would be facing self-interest rather than social interest. It is a basic conflict.

Q And finally, religious belief. You are indicating to the Court Wardell Riley has somehow now seen some form of religious foundation to his life?

A No, not at all. It seems to me indisputable that he has a great deal in his life, not that he is a paragon of virtue, but what he and his family says, then the information I get from different sources that religious belief, and specifically christian belief has been a path

of his life.

Q That is prior to the commission and personally --

A I didn't know personally, but from the evidence I was able to get in checking up on his early background and in research.

MR. ADORNO: May I have one moment, Judge?

THE COURT: Yes.

MR. ADORNO: No further questions.

MR. MORRIS: One question.

REDIRECT EXAMINATION

BY MR. MORRIS:

Q Mr. Riley's character is such that a Christmas present that you told to co-counsel and Assistant Public Defender, Mr. Gottlieb --

A That's one of the small battles we have. I am in a position to make small gifts now and again. I am aware that they are able to give monthly gift parcels, and Mr. Riley gives me a great deal of information that helps me in my research. I would like to make some return, but he has not allowed me to make such.

Maybe I can send him some stationery and books for reading, and last Christmas I wanted to make him the Christmas gift that he was allowed, and he asked me to send it to a friend of his or a cell mate who did not get a gift and to share it with him.

A Clarence Kendricks.

Q Mr. Kendricks, what is your relationship to Wardell Riley?

A He is my uncle.

Q And how long have you known Wardell Riley?

A All my life.

Q How old are you?

A 23.

Q What would you like to tell the Court as far as your knowledge of Mr. Riley's character is concerned and what your relationship has been with him during the course of your life?

A Well, to start at the beginning, you know, I have known him since I have known myself, and, you know, we have always been close, and to say personally speaking I know he couldn't do nothing like that. I know my father. He was like my big brother. I learned from him.

I never owned a gun. I never been to jail for nothing, and to know him, you know, and be close to him and to have him as an image to grow up in I know he couldn't do it.

Q What kind of family man has Wardell been? What kind of father has he been as far as you can tell?

A He always been a good family man, took care of his family. He helped my mother to raise me, and he is just

not that type of person.

Q. Is there anything else you'd like to say on behalf of Mr. Riley while you have the opportunity?

A. Well, I may be jeopardizing myself by making a statement like this, but one thing I know he couldn't have did it because if he would have it would have been talking about another man. It would have been me.

Q. Thank you, Mr. Kendricks.

A. That's how close we were.

Q. Thank you.

[At which time, Mr. Kendricks returned to his seat and another witness was examined and testified as follows:]

EXAMINATION

BY MR. MORRIS:

Q. What is your name?

A. My name is Gene Johnson.

Q. What is your relationship with Wardell Riley?

A. He is my uncle.

Q. How long have you known Mr. Riley?

A. He is my uncle.

Q. How long have you known him?

A. 39. I will be 39 May 1st.

Q. Where did Wardell grow up?

A. Partly in Georgia, partly in Jacksonville.

Q And you have known him in both places?

A Right.

Q Can you tell us a little bit about Mr. Riley and what type of person he has been?

A What would you like to know? His character is well-bred, and to say be black in this country, that's a stigmatism that follows you.

Q Why don't you tell the Court a little bit about Mr. Riley as a family man, as a father, in terms of his religious background that would be of interest to the Judge.

A He is excellent as young as he is to have the family sensitivity that he possesses. When he grew up he wanted a wife and a family and his own little piece of land set aside for whatever venture he might assume later on in life.

This is a trait that the family had, possess, possess land, and my family they also possessed a little land, this stigmatism and not being a parasite.

The man, he is a baby under me, but he is a man. He stands up for his family. He provides for them. Every holiday come he believe in sending them cards and money when he can, and so he is unapproachable when it comes to family.

I don't see how this could have any bearings on the case because the case for which he is accused of

now I feel as though he didn't get no fair trial because in any Court in any country a brick of blood and a brick of gold is two different things, and as far as the evidence in which the police came involved in this case was not evidence.

Blood, the young man, he hurt hisself on the job numerous times where you just don't go to the doctor every time or hurt yourself to get a scratch of blood that they said in the Indictment when they indicted him to murder.

They stated he possessed blood. Well, they determined what kind of blood if his life is at stake or he is going to be electrocuted for having some blood on himself where he scratched himself.

That is to be accepted, but for him to have gone out and did a hideous crime which they say he did, that's not true because there hasn't been any getting down.

I am the oldest. If there had been any getting down on him I would have automatically been involved in it.

Guns and all that, it's mediocre, but he is innocent. He didn't have anything to do with it.

We are family. We stay together as much as possible, but we are independent individuals. You know, we can't get along to the degree that I won't pry into his family life, but if there had been any involvement in him being involved for money, let's say, he wouldn't have did

this for money because he never had to do that, and he wouldn't have had no reason for committing the crime because he never had to suffer for anything because there is so much of us we help out each other.

Q. Thank you for your testimony.

[Whereupon, Mr. Johnson retired to his seat and another witness came forward to testify.]

EXAMINATION

BY MR. MORRIS:

Q. Would you please state your name?

A. Emma Holmes.

Q. Ms. Holmes, what is your relationship to Wardell Riley?

A. That's my brother.

Q. And where do you reside, Ms. Holmes?

A. 836 Northwest 49th Street, Miami, Florida.

Q. Would you like to tell the Court a little bit about Wardell Riley's character and his background?

A. Yes.

He was raised up with my children. I helped to raise him.

I was 24 years old before he was born, and he is just like my son instead of my brother, and personally speaking of him, I know he would never do anything like that.

Q. How is Mr. Riley been while he has been in prison

in terms of his relationship to his family and other people who have visited him?

A. Well, you could investigate in him and could tell he was hurt, but he always would put the best on the outside. He always is smiling. He is always been like that, but you can tell he is hurt, deeply, very deeply because this is something he did not do, but he is always smiling.

Q. Is there anything else while you have the chance that you would like to say on behalf of Wardell Riley?

A. Well, I know he is innocent of this, and Your Honor, please have mercy on him because he is innocent.

Q. Thank you for your testimony.

[Whereupon, Ms. Holmes retired to her seat and another witness came forward to testify.]

EXAMINATION

BY MR. MORRIS:

Q. Mrs. Riley, could you please state your name?

A. Martha Riley.

Q. What's your relationship to Wardell Riley?

A. His wife.

Q. How long have you been married?

A. This year April was nine years.

Q. Are these your children?

A. Yes.

Q. What are their names?

A April Riley and Natanya.

Q And what are their ages?

A 7 and 5.

Q Have the three of you visited Wardell Riley while he has been in prison?

A Yes.

Q What has been his attitude towards his family, towards his friends and visitors while he has been in prison? You have been in constant touch with him, how often have you visited him?

A Well, sometimes like twice a month, whenever I can afford to go up because I have to pay to go up, and I catch the prison bus to go up, and when I can afford to go, I go, and when I can afford to take them, I take them.

Q What type of relationship has he attempted to maintain with you?

A The same one, since we got married and had the kids, we always had the same relationship. When I go to visit him it's the same thing. We always talk about the nice time we had together when he was out with me, and, you know, we like different parks that we'd go, and he asked me if I still do those things.

I say no because sometimes when I do it it brings memories back with the kids, and then it's a burden with me, you know.

MR. MORRIS: April, you don't want to talk?

APRIL: Uh-uh.

MR. MORRIS: Is there anything else you'd like to say on behalf of Mr. Riley?

THE WITNESS: Well, as long as I have been knowing him for this year will be only nine years, and when we first got married we always had a nice relationship and we always prayed together that we will stay together, and my religion is very highly, and I believe in right, and I believe in right doing it.

He always been true to me, and he'd never keep anything from me.

I talk to him, and he is very understanding and everything.

Q [By Mr. Morris] And throughout all this you have kept the relationship and he has kept the relationship together and tried to raise the family together?

A Yes.

We still have the same relationship. If anything goes on with the kids he always wants me to let him know, but some things I don't want to let him know because he can't do anything there, and I feel might be a burden or worry, but I always keep in contact with the kids and him.

See, I keep in touch, see how his health is and how he feels and like that, and really a lot of times it's

a burden on me because they ask when he is coming home and I try to explain the best I know, and they, you know, sometimes cry a lot about him, and then there is nothing I can do about that but talk to him and whatever, and as long as he -- if he gets the life sentence I always still can take them to see him, but he will still be a burden on me as long as he has the death sentence, but life, we will still be able to communicate with each other and we will always stay a family and stay together although he is real far apart now.

MR. MORRIS: Thank you, Mrs. Riley.

MRS. RILEY: Okay.

[Whereupon, Mrs. Riley retired to her seat and another witness came forward to testify.]

EXAMINATION

BY MR. MORRIS:

Q What is your name, please?

A [Inaudible.]

Q Can you speak up a little?

A Minna Riley, Wardell Riley's mother. I raised him the majority on a farm.

He has never been in jail for nothing since he has been alive, and every Sunday we be getting up and playing on the way to church and the people would tell me instead of my son we act like sisters and brothers. We were so

close together.

He would wake up at daylight and he surprised me when he hollered. He handed me a wrist watch or some kind of pretty present. When I hollered he could come up, he came up and put a wrist watch or something on me to make me feel good.

He never gave me a minute's trouble, no way. So I look at them little children and I don't get but one little check and I cry a little when I look because I can't help it.

I would have done the best I can but there was nothing when I worked, and I didn't work enough to fill out a sheet to get Social Security. I don't get nothing but a check, and it's hard as anything.

So I raised him without a father, and people say he is a nice boy. They say they don't believe he could do anything like that.

They say it couldn't be him. They told me any way they could help me they would whether I was raised in Virginia.

MR. MORRIS: Thank you, Mrs. Riley.

MRS. RILEY: Thank you.

MR. MORRIS: That is the testimony as it relates to his character, Your Honor, and in addition I received numerous letters from members in the community who have

known Mr. Riley since he was young which I would offer in evidence in support of our plea in regards to the mitigating circumstances in this case, and even if we are to engage in the assumption, which I am sure the State is going to advance, that Mr. Riley was properly convicted of this crime, it would seem to me, Your Honor, that the mitigating circumstances in this case, the irrefutable mitigating circumstances relate to the character of Mr. Riley as a person and to his record.

Whereas if we look at the two aggravating circumstances that are properly found in this case, namely that this crime was allegedly committed for pecuniary gain and that this crime was allegedly to eliminate witnesses, those two aggravating circumstances really do not relate to the character of the person as far as the propriety of the death sentence is concerned, but rather relates to the criminal intent of the perpetrator of the crime.

Even if Mr. Riley was the perpetrator of the crime, and I believe there was some doubt about that to constitute in and of itself a mitigating circumstance, again the testimony regarding the character of Mr. Riley and the mandate of the Supreme Court of Florida, Mr. Boyd's descent, we would apply that the appropriate penalty in this case would be life imprisonment.

I have nothing further at this time.

MR. ADORNO: Judge, before I make argument to the Court --

THE COURT: Let's hear from the State.

MR. ADORNO: Judge, you are obviously aware of the witness I am going to present to the Court.

[Whereupon, Peter A. Aneer came forward and was examined and testified as follows:]

DIRECT EXAMINATION

BY MR. ADORNO:

Q State your name, please.

A Peter A. Aneer.

Q I would like to give Mr. Aneer an opportunity to speak to the Court on his feeling since the Court is obviously aware of his involvement in the interest in this case.

THE COURT: Is the victim here?

MR. ADORNO: They were scheduled to be here.

THE COURT: Has the victim been informed?

MR. ADORNO: He was notified pursuant to the hearing.

THE COURT: You may proceed.

THE WITNESS: Well, I am not a doctor or a lawyer or anything, but I saw Wardell Riley; he was a very mild-mannered, even-tempered person. He worked for my dad and I for about six months. We both liked him quite well.

He was a good worker; showed up everyday. In fact, we used to pick him up right in front of his house and take him to work, and then his wife and children would pick him up in the afternoon.

Yet, I also saw this man, Wardell Riley, with his wife and children out in the parking lot pull a gun and hold up my father, me, and Robert Lesenby, our supervisor, hold us at gun point, tie us up and lay us on the floor, gag us, strip us of watches and rings and everything we had.

I also saw him walk up to my father and shoot him in the ear, and then I was shot, and then Robert Lesenby was shot.

Now, he didn't take into account our family at that time. My family, my mother, Bob Lesenby's wife, who at the time was pregnant, and as a result lost her baby, or his children by a former wife.

I believe he had a fair trial. The decision was accurate and just, and that's my feelings in the case.

THE COURT: All right, sir.

MR. ADORNO: Thank you.

Judge, I was not the prosecutor in the case. Mr. McWilliams was, and I have had an opportunity to discuss the case with Mr. McWilliams and the detectives, and Mr. Anser is here to represent himself and his own views.

I just got a comment as I was listening to Mr.

Morris give his side of the issue, the defendant's family supporting him, et cetera. I think it's a natural reaction of a family to stand by someone they have loved and known through the years and believe he is innocent.

However, we have a situation here where we had a jury of twelve people who listened to the State's case and also had an opportunity to listen to the defendant denying any complicity and involvement in the case.

Those twelve persons decided to disbelieve him and return a verdict of guilty, and went so far as, knowing the possibility that this Court can enter death, to recommend death. That is as sure as they were that their verdicts spoke the truth.

Then we turn around and the matter is placed on this Court's shoulder, and I am confident that this Court would not have imposed the death penalty or not even have upheld the jury's verdict had this Court had any doubt as to the defendant's guilt in this particular case.

And finally, we have the Supreme Court, although the issue was not raised on appeal as to the sufficiency of the evidence, the Supreme Court in its opinion made the statement, we have the duty to review all error, and we find none, and in essence put a stamp of approval on this Court in position of the finding of the jury's verdict and also the jury's verdict of guilty.

So I believe we are here with the absolute proof that the defendant committed the act which the State alleged and which the State proved in the trial of this defendant.

We have two aggravating circumstances. One mitigating factor that the Supreme Court told the Court it could consider.

Let me just briefly address the mitigating factor that the defendant has not significant history of prior criminal activity. That might be true, Judge, but when he did it the first time it was like taking your first step off of a cliff. He did it with a bang. He did it about as big as you could possibly do it.

Not only do we have armed robbery as part of the first commission of a crime in his history, but then we have, by only the grace of God, what would have turned out to be a triple homicide.

So I really don't put much value in that mitigating factor because of the defendant's own actions that day.

When he did it he did it criminally, what I would call in style, and I say that tongue-in-cheek.

Mr. Morris tells the Court that the two aggravating factors that are present do not really go to the defendant's character which he says is what the Court really should consider in whether to sentence him to death or to life

imprisonment.

I cannot disagree more. I already had my notes to argue to the Court that it was the defendant's actions at the crime that actually show what his character was.

First of all, what was the motive of the crime? Why did he commit a crime? The crime was for pecuniary gain to put money in his own pocket. By the admission of his own family they say he didn't have to commit the crime. We stuck together. He had everything. He never had it tough. There was no need for him to go out and commit a robbery.

So therefore the only conclusion it could be was that Wardell Riley went in that day for greed, for money, to get the little extra things in life that most people do just by working hard and being law abiding citizens.

I think that points to his character. This theory the doctor mentioned about obligations and duties and responsibilities. It's quite obvious he didn't care about any of those, but only the self-indulgence in his desire to get money.

In the second aggravating factor, the Supreme Court says his presence in support of the evidence of that of killing the witnesses in the case to avoid prosecution. What does that tell you about his character?

We are talking about a man who, first of all

makes a determination to commit an armed robbery, in and of itself a crime which is punishable by life imprisonment, and he commits that armed robbery and he ties the three men down on the floor.

Then what kind of a character does he have at that time? What goes through his mind at that very instant? Does he stop and think, I have already committed a bad enough crime, I do not want to make it any worse? Does he stop and say I have got a family and kids and why am I doing this, or does he sit there and think how can I get away with it? What can I do to make sure that my greed will go undetected?

And what is his decision? His decision is to, himself, execute an individual, and agrees, and stands by while a co-conspirator attempts to execute another one, and, in fact, kills another person.

Does that show a person's character as having any type of religious belief in anything or any type of character that knows good or bad, or is that a character that shows he is not a moral person and will do whatever is necessary that he might be able to perform for self-gratification. That is his ultimate goal in committing this crime.

I cannot think of anymore aggravating, aggravating circumstances then this cruel, heinous and atrocious crime than to do it for money, Judge, and then to just outright

execute somebody.

Judge, I am glad I am not in your shoes, and I am sure that jury felt the same way because ultimately the decision in this case rests with you, and it's a heavy decision. But I might say when you take all of the facts in this case, the description that Mr. Aneer gave you that, yes, Judge, you can see the defendant's family present here and they can make their plea to spare his life, but we don't have Mr. Aneer's father here or his family or the manager's family because they are never going to get the benefit of seeing those two individuals again or to enjoy their lives with them as everybody grows older.

I submit to you, Judge, that factually, and I believe the Supreme Court had by inference told you that because the Supreme Court felt that the mitigating could not possibly outweigh the aggravating. All they simply would have done, they would have not reversed for re-sentencing as I argued in my memorandum of law, but reduced it and sentenced him to life imprisonment.

So, the aggravating do outweigh the mitigating, and the only appropriate penalty in this case, based upon the facts which the defendant decided to do, is the imposition of the death penalty.

MR. MORRIS: May I respond to that?

THE COURT: Go ahead.

MR. MORRIS: I think we'd have a mistrial if the jury was here because Mr. Adorno has urged upon the Court the same argument that was urged upon the Court which the Florida Supreme Court held to be reversible error, and that is in the nature of this crime as an especially heinous, atrocious and cruel, that the execution-type killings Mr. Adorno referred to could not be more a cruel crime known.

Probably the most important holding as the Court well knows by the Florida Supreme Court in Mr. Riley's case, by the majority of the Florida Supreme Court, was that this crime does not fall into that category for the purpose of the Florida sentencing as cruel, heinous and atrocious, and if we were to look at inferences into the Court's holding, this is not one of those crimes. Then this is not one of those crimes where the death penalty would be appropriate. The reason why it was remanded is in Ellis v. State says that remands requires that where there are no mitigating circumstances -- and there are mitigating circumstances -- the Florida Supreme Court is bound to send the case back to the trial Court for an initial reweighing because without an initial proper weighing the Florida Supreme Court is not at liberty to reduce the sentence to life imprisonment.

I think Your Honor has to disregard that portion of Mr. Adorno's statement that the nature of the crime was

specially heinous or atrocious, struck with aggravating circumstances, and too, any and all of his argument that pertains to anything outside of the two aggravating circumstances cannot be considered by the Court, and those two aggravating circumstances do not speak of the character or the record of Wardell Riley.

His record is a clean one. The Supreme Court found appropriate the finding of Your Honor that Mr. Riley has no prior criminal activity, and that is always a primary consideration by all the sentencing Judges in this Circuit. Is the client a first offender? Is this particular transaction a first offense, and if Mr. Riley was involved in this?

I submit he was not. If he was, that has to be a primary consideration also. We have, I believe, evidence of mitigation as to his character which unquestionably outweighs those two statutory aggravating circumstances, and because of that the death penalty is clearly inappropriate.

That's the inference by the remand of the Supreme Court of the State of Florida.

I think that the testimony of the witnesses and the testimony of Mr. Turnbull, people who know Mr. Riley very well, all speak of a life by Mr. Riley that is really inconsistent with the picture that is painted by Mr. Adorno; and I think that the testimony establishes a

life that should not be taken by the State of Florida.

We request that Your Honor not impose the death penalty in this case for that reason, and further for the most important reason, I submit, to give me an opportunity to go into further investigation which should have been done in the first place in this case to find out exactly the nature and the extent of Mr. Riley's involvement in this particular transaction.

We are talking about one single transaction, and I would like to have that opportunity and not be cut short by his execution.

Thank you.

THE COURT: May we have a few moments to review the letters which you have submitted in evidence?

Mr. Riley, would you please come forward?

MR. ADORNO: Judge, to bring to the Court's attention, I know that the Court originally asked Mr. Morris if he had anything to present and if the defendant wanted to say anything.

THE COURT: I am going to ask him now.

Mr. Riley, would you please come forward?

Mr. Riley, is there anything you wish to say to the Court before I pronounce sentence?

MR. MORRIS: May we have one minute, Your Honor?

THE COURT: Certainly.

THE DEFENDANT: I would like to.

THE COURT: Yes, sir.

THE DEFENDANT: First, I would like to thank those of my family that stood in my support because that means a lot to me. The three years that I have been away they haven't been very easy or good years at all.

There have been times when I lost sleep from worrying, worrying how I could somehow, the arms of justice would find some way to rectify this so that eventually the truth would win out and we would all know that the arms of the law that we ignored is not infallible, because I still maintain my innocence in this crime. But then you are in the position where the jurors made a decision as to my guilt or innocence.

Even in their case, there had to be some way that there could be exception of the law that was not given a proper evaluation, because in coming into Court, I think you addressed the jury and said that a man is innocent until proven guilty beyond a shadow of a doubt. If there is any chance of doubt you are to find this man innocent.

Personally, I can't speak for the jurors, but personally there was many, many questions compounded with more reasons for them than to find me guilty, but they did

So my only hope now is that somehow, somehow through faith or hard work or the two combined, this will

eventually come to the light.

Personally, myself, I can't say I condone capital punishment because there are some crimes where it might be warranted, but for a man to be put to death for a crime that he has no part in, then that shows no justification at all in our legal system in this country, the justice system or any other way.

So, with the death sentence on the threshold now of coming back into Florida, if I reimpose the death sentence upon me, it is possible within the next twenty-four months or thirty-six months that I can be put to death, and it's also possible that if not given a death sentence that within that period of time or even longer something will come out and the truth will come out, and I will be given that chance to live.

But if I am put to death, then all that is gone. I have no chance. I am just asking you as a human being for an independent decision on your own, your own evaluation. Don't be mislead by the plea of the State because it's their job to plea for my life, for me to be killed.

In the original trial I feel they were subjected to mind control, the ability of Mr. McWilliams to plea and reach their core of sensitivity so well that they said, well, this man has to be guilty. If he hadn't been guilty he wouldn't have been arrested.

But then I am sure in your capacity, every man that is arrested for a crime is not guilty. So, I just say, Your Honor, whatever you feel legally, morally in this case, I am asking you not to impose the death sentence.

THE COURT: Anything further, Mr. Morris?

MR. MORRIS: No, Your Honor, nothing further.

THE COURT: I have nothing but compassion for the family of Mr. Riley and for the family of the victims in this case.

However, I still find that the aggravating circumstances outweigh the mitigating circumstances in this case, and that the jury recommendation of the death penalty was an appropriate recommendation for this crime.

It is therefore the sentence of the Court that you face the death penalty by electrocution as to Count I of the Indictment.

The Court will be in recess.

[Whereupon, the proceedings were concluded.]

* * *

CERTIFICATE

STATE OF FLORIDA :
: SS.
COUNTY OF DADE :

I, RAE S. NEWMAN, Court Reporter and Notary Public, do hereby certify that I was authorized to report the proceedings of said hearing before The Honorable LEONARD RIVKIND, Circuit Court Judge, on April 19th, 1979; that the within transcript, pages 1 through 45, represents a true and accurate record of my shorthand notes taken at that time.

DATED at Miami, Florida, this 14th day of June, 1979.

Rae S. Newman

RAE S. NEWMAN,
COURT REPORTER.

NOTARY PUBLIC STATE OF FLORIDA AT LARGE;
MY COMMISSION EXPIRES AUG. 10 1982
BONDED THRU GENERAL INS. UNDERWRITERS

IN THE SUPREME COURT OF FLORIDA

CASE NO. 49,666

WARDELL RILEY,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 49,666

WARDELL RILEY,

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vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
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IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

INTRODUCTION

The appellant, Wardell Riley, was the defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, and the appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood before the lower court.

In this brief, the symbol "R" will be utilized to designate the original record on appeal from the initial direct appeal in this Court, the symbol "S.R." will be utilized to designate the supplementation to the original record on appeal,

the symbol "Tr." will be utilized to designate the transcript of the sentencing hearing conducted pursuant to the order of remand of this Court, and the symbol "D." will be utilized to designate documents bound in the second record on appeal before this Court. All emphasis is supplied unless the contrary is indicated.

This capital case is before the Court on appeal from a resentencing to death after a remand for sentencing reconsideration was ordered by the Court. Accordingly, the issues presented will be directed to the errors which devolve from the resentencing of Wardell Riley to death.

STATEMENT OF THE CASE

On October 26, 1978, this Court affirmed the defendant's convictions for two counts of first degree murder and one count of assault with intent to commit murder, with Justice Boyd dissenting with opinion as to the sufficiency of the evidence to support the convictions. Riley v. State, 366 So.2d 19 (Fla. 1978). The Court further found that the death sentence could not be upheld since many of the factors considered in aggravation were outside the confines of the statutory aggravating circumstances. Id. at 21-22. Consequently, the case was remanded for sentencing reconsideration, but by the trial judge alone. Id. at 22.

A sentencing proceeding was held on April 19, 1979, before the Honorable Leonard Rivkind, Circuit Judge for the Eleventh Judicial Circuit of Florida in and for Dade County.

(Tr. 1-46). Evidence in mitigation was presented at that time. At the conclusion of the hearing, the trial court again sentenced the defendant to death (Tr. 45).

On April 20, 1979, the trial court entered an order entitled, "Findings In Support of Death Penalty." (D. 19-20). This order reflects that the trial court considered the two statutory aggravating factors approved by this Court on the initial direct appeal and the one statutory mitigating factor approved on the direct appeal. (D. 19-20). The Court concluded that the death sentence was the appropriate sentence based upon the weighing of these circumstances. (D. 19).

This appeal from the reimposition of the death sentence follows.

STATEMENT OF THE FACTS

At the defendant's first sentencing hearing, the prosecutor argued several factors to the jury as requiring the death penalty in this case. Proceeding down the list of statutory aggravating factors one by one, the prosecutor argued that the defendant had knowingly created a great risk of death to many, had committed the capital felonies during a robbery, had committed the offense to avoid a lawful arrest, had committed the offense for pecuniary gain, had committed the offense to disrupt or hinder the lawful exercise of governmental function or the enforcement of laws, and that the offense was especially heinous, atrocious, or cruel. (R. 1324-25). The argument that the offense was especially heinous, atrocious, or cruel was predicated upon

the fact that the father was shot in the presence of the son. (R. 1325).

The prosecutor further argued that certain non-statutory aggravating factors required the death sentence in this case. The prosecutor contended that the defendant had displayed no remorse for the offense and had plotted and carried out a ruthless execution reminiscent of the manner in which the Nazis and Japanese in World War II had executed their prisoners. (R.1330-1334).

The jury recommended life imprisonment on one count of first-degree murder and a death sentence on the other count. (R. 1350-51). The trial judge had stated prior to receiving the jury recommendation:

> THE COURT: I frankly would give a recommendation of the jury great weight because I agree with the Supreme Court of Florida --- what is the purpose of the legislature calling for an advisory opinion by the jury if they expected a Judge to just automatically disregard it in the absence of some extraordinary or compelling circumstances.

(R. 1314-15). The trial judge had given a special instruction to the jury that he would "give serious consideration to the advisory opinion of the jury." (R. 1314-15). The trial judge sentenced the defendant as the jury had recommended. (R. 1470, 1471, 1476).

The trial judge based the death sentence upon six aggravating factors, and one statutory mitigating factor--the defendant's lack of criminal history. (S.R. 2-3). On appeal, two of the

aggravating factors, the defendant's lack of remorse and premeditation, were held to have been improper for consideration since they were outside the statutorily-delineated aggravating circumstances. Riley v. State, 366 So.2d 19, 21 (Fla. 1978). The duplicitous consideration of the fact that the offense was during a robbery and for pecuniary gain was held unlawful. Ibid. The aggravating circumstance that the offense was especially heinous, atrocious, or cruel was held to have been improperly considered since the fact that the father was killed in the presence of the son, the basis of the trial judge's finding, did not establish this statutory factor. Ibid.

This Court affirmed the judgments of conviction, with Justice Boyd dissenting with an opinion holding the evidence insufficient as a matter of law to sustain the convictions. Riley v. State, supra. The death sentence was remanded for reconsideration by the trial judge. Id. at 22.

Pursuant to the remand order of this Court, a sentencing hearing was held on April 19, 1979. (Tr. 1-46). At that hearing, six witnesses testified in mitigation of sentence, three letters were introduced on behalf of the defendant, and one witness testified in aggravation of sentence (Tr. 6-34; D. 13-17).

Dr. Colin Turnbull, Professor of Social Anthropology at George Washington University, testified that, during the course of a two year research study of rehabilitation and security in the state prison systems of Georgia and Florida, he had had occasion to meet and establish a relationship with the defendant. (Tr. 8). On the basis of hours of interviews and weekly correspondence, Dr. Turnbull drew the conclusion that the defendant could

positively contribute to prison society and could be a constructive member of society when released. (Tr. 8-13).

In support of this conclusion, Dr. Turnbull pointed to several factors which pertain to the prediction of the likelihood for ordered social behavior. (Tr. 11). Dr. Turnbull testified regarding the defendant's interrelationship with his family and his sense of responsibility towards them (Tr. 11, 12), the defendant's intelligence and education which assist him in adjusting to difficult situations, (Tr. 12-13), and the defendant's strong religious upbringing which provides him with a sense of purpose. (Tr. 13).

Dr. Turnbull further testified as to specific instances which reinforced his conclusion that the defendant could be a constructive member of society. (Tr. 13). Dr. Turnbull spoke of the defendant's ability to mediate disputes between a group of violent prisoners, and the defendant's request that a Christmas present of stationery and books offered by Dr. Turnbull be instead given to another inmate who had not received any Christmas gift. (Tr. 20-21).

Due to the foregoing, Dr. Turnbull concluded that, although he believed in the death penalty and had met inmates whom be believed deserved the death sentence, the life of Wardell Riley should be spared. (Tr. 11, 15). On cross-examination, Dr. Turnbull further explained that his "personal hunch" was that the defendant was innocent. (Tr. 18).

Five members of the defendant's family testified that the defendant was a hard-working, sensitive, family man with a

loving wife and two young children. (Tr. 22-31). The defendant grew up in an impoverished environment without a father, but his family was very close and spent Sundays together at church. (Tr. 31). The family members affirmed their belief in the defendant's innocence. (Tr. 22-31).

Three letters were introduced into evidence by the defense. One letter from the principal of the Calhoun County, Georgia school system reflects that the defendant is from a hard-working family and did well in school. (D. 15). Another letter from a reverend reflects that the defendant was raised in a religious, Christian, church-going family. (D. 17).

The final letter was from another inmate and was addressed to the defendant. (D. 13-13A). In this letter, the inmate indicated that he had overheard another inmate bragging that he and his cousin had committed the offense for which the defendant was convicted. (D. 13A).

The man who was the third person shot at the time of the offense testified for the state. (Tr. 33). He stated that, while the defendant had been a good, steady worker whom he had liked, the defendant also had committed the offense at issue and had not taken into consideration the victims' families, (Tr. 33-34).

The trial judge thereafter sentenced the defendant to death, stating:

> I have nothing but compassion for the family of Mr. Riley and for the family of the victim in this case.
>
> However, I still find that the aggravating circumstances out-

> weigh the mitigating circumstances in this case, and that the jury recommendation of the death penalty was an appropriate recommendation for this crime.

(T. 45).

In the Findings In Support of Death Penalty entered by the trial judge on April 20, 1979, the trial judge considered two statutory aggravating factors, that the offense was committed during a robbery and was committed to avoid or prevent a lawful arrest. (D. 19-20). As to mitigation, the trial judge weighed one statutory mitigating circumstance, the defendant's lack of prior criminal activity. (D. 20).

POINTS ON APPEAL

I

THE DEATH SENTENCE OF THE DEFENDANT IS UNLAWFUL SINCE THE DEFENDANT HAS BEEN DEPRIVED OF THE ESSENTIAL SAFEGUARD OF A JURY RECOMMENDATION MADE IN CONFORMITY WITH FEDERAL AND FLORIDA LAW AND CONSTITUTIONAL MANDATES.

II

THE TRIAL COURT ERRONEOUSLY FAILED TO CONSIDER EVIDENCE IN MITIGATION OUTSIDE THE CONFINES OF THE STATUTE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

III

THE DEATH SENTENCE OF THE DEFENDANT IS DISPROPORTIONATE AND UNRELIABLE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

I

THE DEATH SENTENCE OF THE DEFENDANT IS UNLAWFUL SINCE THE DEFENDANT HAS BEEN DEPRIVED OF THE ESSENTIAL SAFEGUARD OF A JURY RECOMMENDATION MADE IN CONFORMITY WITH FEDERAL AND FLORIDA LAW AND CONSTITUTIONAL MANDATES.

A. The Significance Of The Jury Recommendation Of Life Or Death In The Florida Capital Punishment Structure.

The Florida legislature has prescribed a tripartite capital sentencing procedure to promote reliability and proportionality in the decision to exact the ultimate penalty. Section 921.141, Florida Statutes (1975). Under this tripartite system, the trial jury, the trial judge, and this Court are charged with the responsibility of independently weighing the evidence in aggravation and in mitigation to determine whether the imposition of the ultimate penalty is necessary. Proffitt v. Florida, 428 U.S. 242, 251-9 (1976); State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1973).

> The statute contemplates that the trial jury, the trial judge, and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence.

Alvord v. State, 322 So.2d 533, 540 (Fla. 1975).

To further engender a reasoned and controlled judgment in sentencing, the Florida legislature has delineated "the aggravating and mitigating circumstances which must be

determinative of the sentence imposed," State v. Dixon, supra at 8. These circumstances, "[t]he most important safeguard" provided in the statute, form the standards for each of the three sentencing decisions in Florida's tripartite system. Ibid.

The first tier of the sentencing decision-making process, the trial jury, is of particular significance under Florida law, for jurors interpose the contemporary community values into the death sentencing resolution. Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968); Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976). Indeed, "juries are the conscience of our communities." McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977), and thus serve as "a significant and reliable objective index of contemporary values because [they are] so directly involved." Gregg v. Georgia, 428 U.S. 153, 181 (1976), citing Furman v. Georgia, 408 U.S. 238, 439-440 (1972)(Powell, J., dissenting); Powell, Jury Trial of Crimes, 23 Wash. & Lee L.Rev. 1 (1966).

In recognition of this important sentencing role played by the trial jury, this Court has commanded that trial judges must give great weight to the life or death recommendation of the advisory jury. Thompson v. State, 328 So.2d 1 (Fla. 1976). And on appeal from a sentence of death, the standard of review employed by this Court differs dramatically dependant upon the recommendation of the jury. Where a death sentence is imposed after a jury recommendation of life, this Court has held:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so

> clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

In contradistinction, where a death sentence is pronounced after a jury death recommendation, this Court has declared:

> The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation.

LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978). The "exacting standards of Tedder" stand as a "crucial protection" for ensuring that a death sentence is properly administered. Dobbert v. Florida, 432 U.S. 282, 295-96 (1977).

Thus, while a jury's sentencing recommendation has been termed "advisory", it can not be gainsaid that it is of integral significance in the Florida "scheme of checks and balances." Messer v. State, 330 So.2d 137, 142 (Fla. 1976). The jury must be provided the same sentencing evidence as is the trial judge and this Court. Miller v. State, 332 So.2d 65 (Fla. 1976); Messer v. State, supra. And the jury and trial judge must adhere to the identical sentencing standards "to insure that a jury and judge could never reach differing conclusions on a sentence as a result of misunderstanding the law or applying different standards to the peculiar facts before them." Chambers v. State, 339 So.2d 204, 208 (Fla. 1976)(England, J., concurring); Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976).

In recognition of its tripartite sentencing review function, this Court has held that, where erroneous factors in aggravation have been submitted to the trial jury which might have influenced its weighing process, a remand for a new jury and judge sentencing proceeding is dictated.

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered.

Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977)(citations omitted).

The Court further explicated the need for a remand to judge and jury by underscoring the constitutional requirement of reliability and control in the capital sentencing decision:

> This result is dictated because, in order to satisfy the requirement of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the sentencing authority's discretion must be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913.

Ibid (emphasis by the Court).

Thus, where a jury recommendation of death is tainted by the consideration of erroneous factors in aggravation, a

remand for a new jury sentencing hearing is required. Elledge v. State, supra; Maggard v. State, ___ So.2d ___ (Fla. 1981) (Case No. 51,614, Opinion filed 5/7/81). Similarly, where mitigatory evidence is excluded, a new jury proceeding must be accorded the death-sentenced defendant. Perry v. State, 395 So.2d 170 (Fla. 1981); Miller v. State, 332 So.2d 65 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976). It is only by providing a new jury sentencing that the requirements of proportionality and reliability can be satisfied. See Gardner v. Florida, 430 U.S. 349, 361-62 (1977).

B. The Sentencing Recommendation By The Defendant's Jury Was Tainted

The Court reversed the defendant's sentence of death because the trial court erroneously considered two non-statutory aggravating circumstances, premeditation and lack of remorse, erroneously considered the statutory aggravating factor that the homicide was especially heinous, atrocious, and cruel, and duplicitously considered the statutory aggravating factors that the homicide was perpetrated during a robbery and for pecuniary gain. Riley v. State, 366 So.2d 19, 21-22 (Fla. 1978). Each of these factors which was erroneously relied upon by the trial judge was advanced at the jury sentencing proceeding by the prosecutor in his argument for death.

As to the non-statutory aggravating factors, the prosecutor argued, "There is no evidence of remorse or sorrow for having committed this crime. None whatsoever. He sits now as he sat through the entire trial -- cool, calm, deliberating." (R. 1330). The prosecutor further advanced:

> [T]he evidence shows this defendant plotted, carried out a ruthless execution -- nothing less than an execution, reminscent of the Nazis and Japanese in World War II where they tied up their prisoners and shot them in the back of the head and kicked them into a grave that they made them dig.
>
> This is a war crime. It is nothing less than an execution.

(R. 1331).

As to the statutory aggravating factors, the prosecutor submitted to the jury that the offense was especially heinous, atrocious, and cruel due to the presence of the son when the father was shot.[1] (R. 1325-26). This fact formed the premise of the trial judge's finding of this statutory aggravating factor. Riley v. State, 366 So.2d 19, 21 (Fla. 1978).

The prosecutor also argued the aggravating factors seriatim and urged both that the offense was committed during a robbery and that it was committed for pecuniary gain. (R. 1324-25). Thus, it is manifest that the jury was tainted by the same argument which misled the trial judge in the consideration of factors in aggravation.[2] Would the result of the jurors'

---

[1] And the instruction given the jury offered no guidance at all to assist it in channeling its discretion in order to apply the correct interpretation of this aggravating factor. (R. 1318-19); See Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759, 1765 (1980); Gregg v. Georgia, 428 U.S. 153, 192-93 (1976). Not even the Standard Jury Instruction on this circumstance articulated in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) was provided to the defendant's jury.

[2] Indeed, Florida law assumes that the trial judge, as one more experienced in sentencing, will serve as a check upon a jury that might be swayed by passion and prejudice. See Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976); State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). If the trial judge was in fact the

weighing process have been different absent the impermissible aggravating factors? Since there was mitigation it is now impossible to know. Elledge v. State, supra at 1003. The jury recommendation is ineluctably tainted.

---

2 (Cont'd)

"buffer"intended, it can only be presumed that the jury was far more tainted than he in the sentencing process. This presumption takes on added force on this record where the prosecutor additionally and erroneously urged that the homicide caused a great risk of harm to many (R. 1324), and was committed to disrupt or hinder the lawful exercise of governmental function or the enforcement of laws, (R. 1325) and fervently and improperly urged the jury to recommend death for the protection of the community:

> This is as bad a murder as you will ever hear about in the history of Dade County. There is none worse, ever in Dade County. This man executed two of our people, two of our citizens.
>
> * * *
>
> This defendant belongs in that class of criminals, with the Thomas Knights, who execute the victims of their robbery to keep them from coming to Court.
>
> * * *
>
> if you think, well we don't want to impose it in this case,--what you are saying is anybody that commits a robbery, you can get life for robbery, and if you kill the witnesses, we are not going to do anything more to you. So, why should they let the witnesses live? Why should they let the witnesses live if they will not be punished more for it?
>
> It is necessary, it is necessary for this defendant and for the rest of the people of our County to know if you commit a robbery and put a gun on people and take their money, you are going to be punished and if you kill the witnesses or lay a hand on our witnesses and citizens of Dade County, if you kill them so they can't come to Court, you are going to face the maximum penalty provided by law.
>
> * * *

C. The Prejudicial Effect Of The Tainted Jury Recommendation

It has been established that Florida law guarantees to each capital defendant three tiers of sentencing review so that the risk of arbitrariness and capriciousness can be averted. It has also been established that the first tier of the sentencing process in this case was infected with the precise maladies that caused this Court to conclude that the trial court's sentencing determination could not stand. The issue which finally devolves is whether the resentencing by the trial judge alone cured the errors with which the jury had been confronted.

Resolution of this final issue must commence with the significance of the recommendation of the jury in this particular case. It has already been demonstrated that Florida

---

2 (Cont'd)

> There comes a time when you have to stand up and be counted. It is not a pleasant task, it is a duty.
>
> You have to say, we will not tolerate this violence and these robberies.
>
> * * *
>
> If there ever was anyone in Dade County that deserved it, this defendant, Wardell Riley, deserved it.

(R. 1331-34).

As to the long-standing recognition by Florida courts of the impropriety of such an appeal by a prosecutor, see Taylor v. State, 123 Fla. 358, 166 So. 825, 826 (1936), Sims v. State, 371 So.2d 211 (Fla. 3d DCA 1979), Porter v. State, 347 So.2d 449 (Fla. 3d DCA 1977), Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976), Smith v. State, 273 So.2d 414 (Fla. 2d DCA 1973), Russell v. State, 233 So.2d 154 (Fla. 4th DCA 1970), and Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968).

law requires that a jury capital sentencing recommendation be accorded substantial weight by the trial judge. But in this case in particular the trial judge made it clear on the record that the jury's recommendation would be particularly paramount in his sentencing judgment.

At the very outset of the jury sentencing proceeding, the trial judge expressed his view that the standard jury instructions did not emphasize sufficiently the great weight to which the jury's recommendation is entitled. (R. 1310-11). The trial judge suggested that the jury be specially instructed that he would "give serious consideration to the advisory opinion of the jury." (R. 1314-15). With the agreement of counsel, the jury was so instructed. (R. 1314-15, 1317).

And with total candor, the trial court explained to both counsel before the jury sentencing hearing just how he would view the jury recommendation:

> THE COURT: I frankly would give a recommendation of the jury great weight because I agree with the Supreme Court of Florida --- what is the purpose of the legislature calling for an advisory opinion by the jury if they expected a Judge to just automatically disregard it in the absence of some extraordinary or compelling circumstances.

(R. 1314-15). In keeping with this expression of intent, the trial judge precisely adhered to the jury recommendation of death on one count and life imprisonment on the second count. (R. 1470, 1471, 1476).

Significantly, at the sentencing hearing held pursuant to the remand order of this Court, the trial court in

resentencing the defendant to death reaffirmed the deference paid to the jury recommendation:

> I have nothing but compassion for the family of Mr. Riley and for the family of the victim in this case.
>
> However, I still find that the aggravating circumstances outweigh the mitigating circumstances in this case, and that the jury recommendation of the death penalty was an appropriate recommendation for this crime.

(T. 45).

The defendant was thus placed in a far worse position than if there had been no jury proceeding at all. The trial judge's inability to ignore the tainted jury recommendation of death inexorably played a part in the resentence of death. The trial judge understandably could not and did not disregard the misconceived sentencing judgment of the jurors.

In a very different but strikingly apposite context, this Court has explicated the harm which emanates from "piecemeal", after-the-fact attempts to cure error by a remand to a trial judge after a jury verdict. Greene v. State, 351 So.2d 941 (Fla. 1977). In Greene, this Court held that an appellate court can not absolve the error of a trial court in not ruling on the voluntariness of a defendant's confession by simply remanding to the trial court after a jury verdict of guilty. The Court explained, "A judge is not a computer which can consistently make an objective determination as to the admissibility of a confession without the possibility that a prior jury verdict of guilt may influence that ruling." Id. at 942. The following quote from the dissenting opinion of Judge Johnson of the

District Court of Appeal of Florida, First District, in Land v. State, 280 So.2d 711 (Fla. 1st DCA 1973) was noted with approbation:

> I have serious doubts that a trial judge, after a conviction by a jury composed of fellow community members and probable friends of whose opinion he may view with high regard, can anymore be uninfluenced by such jury conviction than the jury can be uninfluenced by the fact of a confession.

Ibid.

The trial court in this case certainly was not uninfluenced by the jury recommendation of death, despite the fact that the jury recommendation suffered from the same flaws as marred the trial judge's findings. The resultant prejudice to the defendant is patent.

And this Court, charged now with the obligation of reviewing the propriety of the defendant's death sentence, faces a similar dilemma. Is the defendant to be deprived of the Tedder standard of review of his sentence since a majority of the jurors recommended a sentence of death, albeit on such a prejudicial basis as required the trial judge's sentencing reconsideration? Is the lawfulness of the defendant's sentence to be gauged by the LeDuc standard of review which governs untainted jury recommendations of death?[3] Or is the sentence

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[3] That this Court can not treat this cause as a death sentence imposed after a jury death recommendation is made clear by well-established Supreme Court precedent. That Court has recognized that where a jury is instructed on several grounds for conviction, one of which later proves to be unconstitutional,

now to be reviewed as though there had been no jury recommendation at all?

The sentencing review function of this Court is the final, most crucial protection a death-sentenced defendant has. The standards of review utilized by the Court protect the capital defendant's rights to due process, equal protection, proportionality and reliability. On this record, however, the guarantee that this Court will "perform its function of death sentence review with a maximum of rationality and consistency", Proffitt v. Floirda, 428 U.S. 242, 258-59 (1976), cannot be fulfilled; the defendant's critical Eighth and Fourteenth Amendment rights can not be safeguarded. For as this Court has emphasized, the protection of a jury recommendation is an essential and critical right of the capital defendant:

> Both the trial judge, before imposing a sentence, and this Court, when reviewing the propriety of the death sentence, consider as a factor the advisory opinion of the sentencing jury. In some instances it could be a critical factor in determining whether or not the death penalty should be imposed.

. . . . . .

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3 (Cont'd)

a reviewing court cannot determine thereafter whether improper grounds were relied upon and consequently the verdict must be set aside. Stromberg v. California, 283 U.S. 359, 367-68 (1931); accord, Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970); Street v. New York, 394 U.S. 576, 585-88 (1969); Yates v. United States, 354 U.S. 298, 311-12 (1957); See also Presnell v. Georgia, 439 U.S. 14 (1978).

This principle is certainly no less controlling where a jury sentencing verdict of death is at issue, for capital cases require an even greater "degree of certainty". Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980); Burger v. Zant, ___ F.Supp. ___ (S.D.Ga. 1980)(Case No. CV 280-114, Opinion filed 4/29/81).

Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974).

It is imperative that the death sentencing process be "rationally reviewable" before a sentence of death is scrutinized by an appellate court. Godfrey v. Georgia, ____U.S.____, 100 S.Ct. 1759, 1765 (1979); Woodson v. North Carolina, 428 U.S. 280, 303 (1976). In this case, on this record, this obligation of reliable review, without speculation, is impossible to achieve.

In Gardner v. Florida, 430 U.S. 349 (1977), the Supreme Court of the United States was ultimately faced with the question of what disposition of the case would be appropriate. The state contended that a remand of the cause to this Court for a second sentencing review of the record supplemented with the presentence investigation was a sufficient remedy. The Supreme Court rejected this approach:

> That procedure, however, could not fully correct the error. For it is possible that full disclosure followed by explanation or argument by defense counsel, would have caused the trial judge to accept the jury's advisory verdict.

Id. at 362.

No less in this case, the remand for resentencing by the trial judge alone "could not fully correct the error." The weighing process by the jury could very well have been altered by the exclusion of the improper aggravating factors.

> Since we cannot know and since a man's like is at stake, we are compelled to return this case to the trial court for a new sentencing trial. . . .

Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977)(citations omitted).

II

THE TRIAL COURT ERRONEOUSLY FAILED TO CONSIDER EVIDENCE IN MITIGATION OUTSIDE THE CONFINES OF THE STATUTE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The unique need for reliability and individualization in the death sentencing determination has led to the requirement that all mitigating circumstances applicable to a defendant be considered by the sentencing arbiters. Lockett v. Ohio, 438 U.S. 586 (1978); Roberts v. Louisiana, 431 U.S. 633 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976). The mitigating factors delineated in Section 921.151(6), Florida Statutes (1975), are therefore only exemplary;[4] at all three levels of the Florida capital sentencing structure, consideration must be given to all evidence in mitigation, for "individualization" in sentencing contemplates a "character analysis of the defendant to ascertain whether the ultimate penalty is called for in his

---

[4] The defendant's jury was not so instructed. (R. 1320). However, this Court has held that the instructions provided the jury do not impermissibly restrict consideration of mitigating evidence. Ruffin v. State, ___ So.2d ___ (Fla. 1981)(Case Nos. 55,684; 56,741, Opinion filed March 26, 1981); Peek v. State, ___ So.2d ___ (Fla. 1980) (Case No. 54,226, Opinion filed October 30, 1980). While the defendant does not waive the contrary contention under the Eighth and Fourteenth Amendment requirements set forth in Lockett v. Ohio, supra, this point will not be belabored in this brief. But see Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978)(Lockett requires that trial judge must clearly instruct the jury about mitigating circumstances and option to recommend against death).

or her particular case." Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977).

At the defendant's sentencing hearing, extensive evidence in mitigation was presented. Dr. Colin Turnbull, Professor of Social Anthropology at George Washington University, first presented testimony in the defendant's behalf. During the course of a two year research study of rehabilitation and security in the state prison systems of Georgia and Florida, Dr. Turnbull had had occasion to meet and establish a relationship with the defendant. (Tr. 8). From many hours of interviews and weekly correspondence, Dr. Turnbull was able to draw the conclusion that the defendant could positively contribute to prison society and could be a constructive member of society when released. (Tr. 8-13). In support of this conclusion, Dr. Turnbull identified specific factors which established Wardell Riley's likelihood for ordered social behavior.

The first factor centered upon the defendant's family. (Tr. 11). Dr. Turnbull explained that, unless one develops a sense of mutual responsibility and obligation within the family as a child, there is little chance of obtaining, as an adult, an inner emotional sense of responsibility. (Tr. 11). Through pertinent discussions with the defendant and his family, Dr. Turnbull was able to identify a strong emotional sense of responsibility on the part of the defendant. (Tr. 11-12). The defendant continuslly exhibited concern to Dr. Turnbull for his family's welfare, and while refusing to accept favors for

himself, would request small favors such as holiday cards for members of his family. (Tr. 11-12).

Dr. Turnbull further explained that the defendant's strong emotional stability is augmented by his educational background and his intellectual abilities which enable the defendant to understand the social processes of reciprocal obligation. (Tr. 12). The defendant exudes an ability to adjust to situations with which he does not agree. (Tr. 12). For an example, Professor Turnbull pointed to the defendant's acceptance of and attempt to understand prison rules no matter how personally distasteful. (Tr. 13).

And the final significant factor which further convinced Dr. Turnbull that the defendant would place social interests above self interests is the defendant's strong religious background which gives the defendant a sense of purpose. (Tr. 13). Dr. Turnbull had observed a variety of incidents during which the defendant evinced a strong concern for the interests of others over his own. For example, on the preceding Christmas, Dr. Turnbull had offered to send stationery and books to the defendant; the defendant asked that the gifts instead be sent to another inmate who had not received any Christmas gift. (Tr. 20). On other occasions, the defendant had been able to resolve disagreements between members of a rather violent group of inmates. (Tr. 21). And discussions with prison officials about the defendant and observations of the defendant's interactions with other inmates and prison officers further solidified Dr. Turnbull's conclusion that the defendant affirma-

tively contributes to the prison environment and could be a constructive member of society. (Tr. 13).

Dr. Turnbull was of the view that the death penalty is a necessity in contemporary society; Dr. Turnbull had met with prisoners whom he believed deserved the penalty of death. (Tr. 15). Due to the foregoing factors, however, Dr. Turnbull concluded that the defendant is definitely not an appropriate individual for execution of the death sentence. (Tr. 11).

On cross-examination, Dr. Turnbull was asked whether he believed Wardell Riley when he continually maintained his innocence. (Tr. 18). Dr. Turnbull responded that his professional abilities were not concerned with that factor and he lacked sufficient data, but his "personal hunch" was that the defendant was telling the truth. (Tr. 18).

Five members of the defendant's family also testified. The witnesses described the defendant as a hard-working, sensitive, family man with a loving wife and two children who visit him whenever possible. (Tr. 22-31). The defendant's mother explained that the defendant had grown up in an impoverished background without a father. (Tr. 31). The family had nevertheless been extremely close, and had spent every Sunday together at church. (Tr. 30-31). All members of the family expressed their faith in the defendant and belief in his innocence. (Tr. 22-31).

Three letters were also introduced into evidence. One letter from the principal of the Calhoun County, Georgia school system reflects that the defendant is from a hard-working family, and was a good student in the public school sytem. (D. 15).

Another letter from a reverend in Morgan, Georgia reflects that the defendant was brought up in a religious, Christian, church-going family. (D. 17).

A final letter from an inmate of the state prison and addressed to the defendant is of particular import. (D. 13-13A). According to the inmate, he had overheard another inmate stating that he and his cousin were responsible for the offenses for which the defendant had been convicted. (D. 13A). Many of the facts of the crime were mentioned by this individual, who evidently had been bragging about the fact that someone else had been convicted for his criminal acts. (D. 13A).

The trial court failed to weigh any of this mitigating evidence. (D. 20). Rather, the trial judge only considered the statutory mitigating factor previously found, that the defendant has no history of prior criminal activity. The trial court's order specifies:

> As to the mitigating circumstances:
> 1. The defendant has no significant history of prior criminal activity (Section 921.141(6)(a) Florida Statutes). There are no other mitigating circumstances.

(D. 20).

The record before this Court demonstrates that the trial judge thusly restricted his consideration because he deemed the mitigating circumstances to be circumscribed by the provisions of Section 921.141(6), Florida Statutes. At the original jury sentencing proceeding, the trial judge indicated that he would provide the jury with the written jury instructions since they set "forth the mitigating and aggrava-

ting circumstances." (R. 1345). At the subsequent sentencing proceeding, the trial judge stated, "I have searched in vain for sufficient mitigating circumstances under the law which would justify a sentence other than the death penalty in this case." (S.R. 2). The trial judge in finding only one mitigating circumstance applicable explained, "The only mitigating circumstance under Florida Statute is the fact that the Defendant had no prior criminal conviction." (S.R. 2).

At the sentencing hearing on remand, the trial judge reiterated that the only mitigating circumstance that he would weigh was the one factor delineated in the statute. (D. 20). This restrictive view of mitigation was reinforced by the prosecutor, who argued that this Court's opinion set forth the mitigating factor which the trial judge could consider:

> We have two aggravating circumstances. One mitigating factor that the Supreme Court told the Court it could consider.[5]

(Tr. 36).

---

[5] This Court's opinion states:

> Appellant's principal argument to us is that a death sentence is not warranted for his crime, ..., and second because the statutory mitigating circumstances outweigh in significance the statutory aggravating factors.

Riley v. State, supra at 21.

Further, the Court noted:

> The one mitigating factor found to exist in this case was appellant's lack of any significant history of prior criminal activity. All other mitigating factors in Section 921.141(6) were properly found to be absent.

Ibid.

Yet, this Court and the Supreme Court of the United States have recognized that the mitigating circumstances are not limited and, indeed, that many of the precise factors shown in this case are entitled to weight in the death sentencing judgment. Lockett v. Ohio, supra; Songer v. State, 365 So.2d 696 (Fla. 1978). For example, this Court has recognized as relevant factors in mitigation the employment status of the defendant, Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978), the family history such as the patterns in general upbringing, Perry v. State, 395 So.2d 170 (Fla. 1981), whether the defendant was raised without a father, Neary v. State, 384 So.2d 881 (Fla. 1980), and whether the defendant has children in his or her care. Jacobs v. State, ___ So.2d ___ (Fla. 1981). (Case No. 50,175, Opinion filed March 26, 1981). The prognosis for rehabilitation, Lockett v. Ohio, 438 U.S. 586, 594 (1978), Gardner v. Florida, 430 U.S. 349, 360 (1977), and the possibility of innocence also are entitled to mitigatory consideration. See Green v. Georgia, 442 U.S. 95 (1979).

The findings submitted by the court below delineate only one mitigating factor weighed by the court.[6] Juxtaposition

---

[6] The trial judge is charged with the responsibility of articulating the mitigating circumstances which he may or may not have considered so as to provide this Court with the opportunity to perform meaningful review of the sentence of death. Magill v. State, 383 So.2d 901, 904 (Fla. 1980); State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). The findings of the trial judge in this case, reflecting the weighing of only one mitigating circumstance, notwithstanding the extensive evidence in mitigation, pretermits any "meaningful review" of the defendant's sentence.

of the extensive evidence presented in mitigation against the findings in support of death, the statements previously made by the trial judge, and the argument of the prosecutor, makes manifest that the trial judge erroneously deemed himself constrained to limit his mitigative consideration.[7]

The Eighth Amendment commands that relevant mitigating evidence be given "independent weight" to preclude "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). In this case, this requirement of law was not fulfilled. With meaningful review of the death sentence now an impossibility, the death sentence of the defendant can not be upheld.

III

THE DEATH SENTENCE OF THE DEFENDANT IS DISPROPORTIONATE AND UNRELIABLE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

It has been demonstrated that the sentence of death imposed upon the defendant was not the result of a jury recom-

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[7] It must be emphasized that the defendant is not claiming that, as a matter of law, the trial court was obliged to give overriding weight to the non-statutory mitigating evidence. But see Point III, infra. Rather, it is the failure to weigh at all this mitigating evidence which forms the gravamen of the defendant's claim. For ultimately, the unduly restrictive view of the evidence which could be considered ensured that an individualized and reliable sentencing resolution would not be achieved.

mendation or a trial court judgment resolved consistent with the dictates of our law or our constitutions. With the first two tiers of the trifurcated capital structure so basically tainted, this Court is now asked to perform an impossible task of sentencing review. Nevertheless, on the evidence before the Court, an independent weighing and assessment of all pertinent factors requires that the death sentence be stricken as disproportionate and unreliable.

It is true that the trial court found two statutory aggravating factors previously approved by this Court on the first direct appeal[8] and only one statutory mitigating factor. However, much evidence of a non-statutory mitigating nature was presented and erroneously not considered, evidence which calls for a less severe penalty. See Point II, supra.

Moreover, this case can not be prudently compared with other cases with similar aggravating and mitigating circumstances. For the most crucial factor in mitigation which compels consideration is the real possibility of the defendant's

---

[8] This Court has previously approved application of the factor that this offense was committed during a robbery, Riley v. State, 366 So.2d 19, 21 (Fla. 1978). The defendant would note, however, that the state predicated its case for conviction in part on a felony-murder theory. (See, e.g., R. 454, 1177-1180, 1273). Since the verdict of the jury was general, it is impossible to discern whether the defendant is being doubly and disproportionately punished for the identical aspect of the offense. Thus, separate consideration of the robbery is contrary to the due process restraints on presumptive death sentences, see Tot v. United States, 319 U.S. 463, 467 (1943), Shue v. State, 366 So.2d 387, 390 (Fla. 1978), the proportionality and reliability requisites of the Eighth Amendment, see State v. Cherry, 298 N.C. 86, 257 S.E.2d 551, 567-68 (1979), and the proscription against double punishment. Ibid.

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innocence.[9]

It is indisputable that the jury determined the defendant's guilt "beyond a reasonable doubt." But see dissenting opinion of Justice Boyd holding the evidence insufficient as a matter of law to support the convictions. Yet, this Court has opined that, as to sentencing factors, a higher standard of proof may be necessary to guard against an excessive sentence to death.

Specifically, as to aggravating circumstance 5(e) of Section 921.141, Florida Statutes, that the offense "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody", this Court has required that proof of the requisite intent must be "very strong." Riley v. State, 366 So.2d 19, 22 (Fla. 1978).[10]

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[9] It must be noted that the likelihood of suffering the death penalty is stacked against an innocent person who is somehow convicted despite the safeguards of our system. The statutory aggravating and mitigating factors are preconceived for the judgment of a person guilty of a capital offense. Thus, an innocent person found guilty of a horribly atrocious offense, might find that all of the aggravating circumstances save (a) "under sentence of imprisonment" and (b) "prior violent conviction" were applicable to the offense. And none of the statutory mitigating circumstances would undoubtedly apply, save perhaps (a) "no prior criminal activity" or (g) "the age of the defendant."

The defendant is confronted with this predicament. He has no prior criminal history and was twenty-seven at the time of the offense. (R. 1342, S.R. 3). Character witnesses describe him as a hard-working, church-going, family man. (Tr. 22-31). Yet, two aggravating factors have been found applicable to the offense for which he has been convicted. Thus, while steadfastly maintaining his innocence, he faces death.

[10] It is clear that if the legislature intended this circumstance to include offenses against individuals other than law enforcement officers, as this Court has held, then the offense at issue would satisfy this standard, although proof of the offender would not. See Riley v. State, supra.

In Armstrong v. State, ____So.2d____ (Fla. 1981)(Case No. 48,516, Opinion filed March 26, 1981), this Court explained this standard as necessitating that "the proof must be even stronger than proof beyond a reasonable doubt."

This Court in Armstrong further applied this identical standard to aggravating circumstance 5(h) of Section 921.141, Florida Statutes. In holding insufficient the proof in that case of an execution-type slaying, evincing a cold, calculated design to kill sufficient to qualify as a heinous, atrocious, or cruel offense, the Court held:

> In order to invoke such a basis for a heinousness finding, however, the same standard of proof as is required to establish a purpose to eliminate witnesses should be applied. It simply cannot be said that there was proof, stronger than proof beyond a reasonable doubt, that the robbers killed in order to assure that there would be no witnesses against them.

Ibid.

Evidence of guilt should be held to no less a certainty. See Green v. Georgia, 442 U.S. 95 (1979); Wash.Rev.Code § 10.94.020(10)(a) (1980); Model Penal Code § 210.6(1)(f) (Proposed Official Draft, 1963). The unique need for reliability in the imposition of the death penalty must demand that the evidence of guilt equally be "very strong", "even stronger than proof beyond a reasonable doubt." See Woodson v. North Carolina, 428 U.S. 280, 305 (1976). In this case it was not.

And setting aside the issue of guilt or innocence as well as the non-statutory mitigating evidence not considered by the trial judge below, it is still apparent that the defend-

ant's sentence is disproportionate when compared to similar capital cases for which this Court has ordered a reduction to life imprisonment.

In Neary v. State, 384 So.2d 881 (Fla. 1980), this Court reduced the death sentence to life where the defendant and a co-defendant had committed a burglary, robbery, sexual battery and strangulation murder of a sixty-year-old woman. In Malloy v. State, 382 So.2d 1190 (Fla. 1979), the Court similarly reduced the defendant's sentence for a double execution-style homicide during a robbery where two co-defendant's who participated had pled to lesser sentences. In Burch v. State, 343 So.2d 831 (Fla. 1977), the Court vacated the death sentence where the defendant had murdered a young woman through multiple stabbings during an attempted rape, where the defendant's capacity was impaired and he lacked o prior criminal history. In Provence v. State, 337 So.2d 783 (Fla. 1976), the Court ordered the reduction of the death sentence to life imprisonment where the defendant had perpetrated a multiple-stabbing homicide of the victim during a "drug rip off" robbery and no mitigating circumstance was established.

The precedent of this Court thus supports the reduction of the death sentence in this case.[11] And when all the

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[11] In light of the decisions of this Court and of the Supreme Court of the United States, the defendant will not present repetitive arguments that his death sentence cannot be upheld due to the unconstitutionality of Section 921.141. However, the defendant does not waive any contentions that capital punishment is per se violative of the Eighth and Fourteenth Amendments and that Section 921.141 is unconstitutional.

evidence in mitigation is considered and weighed in the sentencing balance, it is patent that the aggravating circumstances do not outweigh the mitigating circumstances beyond all reasonable doubt. See Alvord v. State, 322 So.2d 533, 540 (Fla. 1977). The defendant's death sentence cannot stand.

CONCLUSION

BASED upon the foregoing authorities and policies, the death sentence must be vacated and the cause remanded either for a new sentencing proceeding before a jury or for imposition of a sentence of life imprisonment.

Respectfully submitted,

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Case No. 82-5348

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WARDELL RILEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA IN THE UNITED STATES SUPREME COURT

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PRELIMINARY STATEMENT

Any record references shall be to Petitioner's Petition, identified by the symbol "P" in parentheses followed by the appropriate page number, or to Petitioner's Appendix, identified by the symbol "A" in parentheses, followed by the appropriate page number.

OPINION BELOW

Petitioner seeks review by this Court of his death sentence, imposed by the trial court, and reviewed by the Florida Supreme Court in Riley v. State, 413 So.2d 1173 (Fla. 1982).

JURISDICTION

Petitioner improvidently seeks to invoke this Court's jurisdiction pursuant to Title 28, U.S.C., Section 1257(3). The issue raised by Petitioner should not be reviewed by this Court. Review by Writ of Certiorari is a matter of sound judicial discretion, and will be granted only where there are special

and important reasons therefore. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT, IN UPHOLDING THE DEATH SENTENCE FINDINGS OF THE TRIAL COURT, VIOLATED THE PETITIONER'S RIGHTS WHERE THE TRIAL COURT CONSIDERED BUT REJECTED NON-STATUTORY MITIGATING CIRCUMSTANCES.

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case is accepted. The facts as found by the Florida Supreme Court in Riley v. State, 366 So.2d 19 (Fla. 1978), and Riley v. State, 413 So.2d 1173 (Fla. 1982), are adopted by the State.

REASONS FOR NOT GRANTING THIS WRIT

Petitioner argues that a federal question is presented because (according to him) the trial court refused to consider non-statutory mitigating circumstances.

Factually, not to mention legally, Petitioner's complaint is without merit. In his resentencing order, the trial court found:

> The State and the defendant were afforded the opportunity to present testimony and evidence relevant to the sentence. After having considered all the testimony, evidence and arguments which have been presented, and having considered the provisions of Section 921.141 Florida Statutes, and having considered the opinion of the Supreme Court, the court, independent of, but in agreement with the advisory sentence of the jury does hereby impose the death penalty upon the defendant, Wardell Riley. (Emphasis added) A-12

Moreover, at Petitioner's resentencing hearing, the trial court listened to Petitioner's "expert witnesses" as well as his other witnesses and listened to argument on behalf of

Petitioner's proffered mitigating circumstances. (A-20-65). If the trial court had decided not to consider these non-statutory mitigating circumstances, he would not have allowed Petitioner to present the evidence and/or testimony. Put another way, the mere fact that Petitioner was allowed to present his witnesses in support of his non-statutory mitigating circumstances refutes any notion that Petitioner's extra-statutory evidence was not considered.

As was stated by the Florida Supreme Court in the second Riley opinion:

> [3,4] We reject Riley's contention that the trial judge failed to consider certain evidence introduced by Riley during the resentencing proceeding to demonstrate nonstatutory mitigating factors. The trial judge expressly stated that he considered all the testimony and evidence presented. Furthermore, there is no indication from the record that he limited his consideration of mitigating factors to only those which are statutorily enumerated. Because he failed to find the mitigating factors which Riley urged does not mean that he did not consider the evidence. It lies within his province to decide whether a particular mitigating circumstance in sentencing is proven and the weight to be given it. Smith v. State, 407 So.2d 894 (Fla. 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979). Here, we find no error in his decision. Id at 1175

This case is distinguishable from, say, Eddings v. Oklahoma, __U.S.__, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), where the mistake committed by the trial judge was that he "...did not evaluate the sentence in mitigation and find it wanting as a matter of fact, rather he found that as a matter of law he was unable even to consider the evidence." (emphasis in original) Id. at 71 L.Ed.2d 10. Here, unlike Eddings v. Oklahoma, the mitigating circumstances presented by Petitioner were properly considered and rejected.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida should be summarily denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Karen M. Gottlieb, Assistant Public Defender, Eleventh Judicial Circuit, 1351 N.W. 12th Street, Miami, Florida 33125, this 28th day of September, 1982.

David P. Gauldin
Of Counsel